89-1156

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term 1990

BATH IRON WORKS CORPORATION,

and

COMMERCIAL UNION INSURANCE COMPANY,
Petitioners

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

U.S. DEPARTMENT OF LABOR,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether United States Court of Appeals for the First Circuit correctly determined that the Employer is solely liable for payment of Longshore and Harbor Workers' Compensation Act death benefits, which were expanded by amendment in 1972, in a case involving pre-amendment permanent total disability and post-amendment death, notwithstanding Congressional provision for a special funding mechanism.

Whether the applicable portion of the statute, 33 U.S.C. § 910(h)(1) as drafted, is ambiguous, in view of opposing opinions on identical facts in the United States Court of Appeals for the First Circuit and the United States Court of Appeals for the Sixth Circuit.

LIST OF PARTIES

The parties in this case when it was presented to the U.S. Court of Appeals for the First Circuit, Docket No. 89-1126, were Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor,[1] Petitioner; and Bath Iron Works Corporation[2] (hereinafter BIW) and Commercial Union Insurance Companies[3], Respondents; and Velma L. Lebel, claimant.

[1]Director of OWCP is a party under § 921(c) [See Goldsmith v. Director OWCP, 838 F.2d 1079 (9th Cir., 1988)].

[2]Bath Iron Works Corporation (BIW) reports, pursuant to Rule 28.1 of the Rules of this Court it is now a wholly owned subsidiary of Bath Acquisition Corporation, which in turn is owned by Bath Holding Corporation.

[3]Commercial Union Insurance Company, reports, pursuant to Rule 28.1 of the Rules of this Court, that it is a wholly owned subsidiary of Commercial Union Insurance Companies. It has the following affiliates: American Employers Insurance Company, Employers Fire Insurance Company, Northern Assurance Company of America, Commercial Union Custom Insurance Company, American Central Insurance Company, and Commercial Union Life Insurance Company of America.

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Petitioners Bath Iron Works Corporation (BIW) and Commercial Union Insurance Company pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on September 20, 1989 in Director, Office of Workers' Compensation Programs, United States Department of Labor v. Bath Iron Works Corporation, et al., ___F.2d___ (1st Cir. 1989). That judgment reversed the Benefits Review Board (hereinafter BRB) holding that Employer BIW's liability for death benefits, when the injury preceded the 1972 amendments to Longshore and Harbor Workers' Compensation Act,[4] (hereinafter LHWCA) but the death postdated these amendments, was limited

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[4] 33 U.S.C. § 901-950, relevant portions set forth in Appendix D.

to the maximum death benefits[5] for which BIW was responsible pre-1972. The BRB had ruled that the increase in death benefits authorized by the 1972 amendments to LHWCA was to be paid by the special fund and appropriations.[6]

Pursuant to Supreme Court Rule 28(c), the Petitioners' report that the constitutionality of a statute or a state constitution is not in dispute and no such issues have been certified to a State Attorney General.

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[5]The claimant's benefit was set by the BRB. There was a subsequent revision of the BRB finding to include a benefit for employee's stepson.

[6]33 U.S.C. § 944, Appendix D.

OPINIONS BELOW

When the Employee died in 1983, claimant widow filed for death benefits under § 909[7] of LHWCA.[8] After hearings, a death benefit award was entered by an Administrative Law Judge (hereinafter ALJ) (ALJ Opinion, 85-LHC-367, set forth in Appendix C) holding that BIW and its Insurance Carrier were liable for full payment of the death benefits. The BRB vacated part of the ALJ holding and held that BIW was liable only for the maximum benefit due under the pre-1972 version of the statute and that the special fund and appropriations were liable for the

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[7] 33 U.S.C. § 909, Appendix D.

[8] Previously, the issue of employer's liability for employee's permanent total disability had been litigated. ALJ order 6/2/75, 74-LHCA-189; Lebel v. BIW, 3 B.R.B.S. 216 (1976), Lebel v. BIW, 544 F.2d 1112 (1st Cir., 1976).

balance of the increase due under the 1972 amendments (B.R.B. opinion #86-429 11.30.88, set forth in Appendix B).[9] The Director of OWCP appealed, and the First Circuit Court of Appeals held that 33 U.S.C. § 910(h)(1) did not apply when pre-amendment permanent total disability was followed by post-amendment death. That court rejected the BRB determination that the special fund was responsible for payment and required BIW to pay the increases. (Director, Office of Workers' Compensation Programs, United States Department of Labor v. Bath Iron Works Corporation et al, supra, p. 3.

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[9]The actual dollar value due claimant, $173.58 per week (employee's stipulated average weekly wage) plus annual cost-of-living increases, is not contested by any party.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on September 20, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTES

This case involves the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901-950, specifically § 909 and 910(h)(1), (2), and (3), and § 944 set forth in Appendix D.

STATEMENT OF THE CASE

Edwin Lebel was employed by BIW for 41 years. Because of the maritime nature of his employment, his compensation benefits are defined by LHWCA. Prior to the passage of the 1972 amendments, he was permanently and totally disabled by work related chronic obstructive pulmonary

disease and was awarded total disability benefits for that injury. The ALJ found as fact that the compensable disability accelerated congestive heart failure and contributed to the Employee's death on January 4, 1983. The ALJ also found that the claimant, Velma L. Lebel, was the widow of the Employee as defined by LHWCA § 909(b).[10] None of these findings were appealed.

Prior to 1972, LHWCA death benefits were limited by a dollar value maximum and the requirement that the death be work-related. The 1972 amendments increased benefits, repealed the cap, and expanded coverage to deaths from any cause following maritime injuries that produced permanent total disability, the

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[10]Additionally, the ALJ found that the Employee's stepchild, the claimant's child, was wholly dependent on the Employee for support on September 10, 1971 designated as the date of injury.

"unrelated death" provision.[11] The widow and dependant are entitled to death benefits.[12] The question is whether the special fund established by LHWCA § 944 and appropriations pay for the increased benefits mandated by the 1972 amendments, or whether BIW must pay the entire compensation due. The answer hinges on whether § 910(h)(1) applies when the

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[11]33 U.S.C. § 909 was later amended in 1984 to eliminate the "unrelated death" provision. 33 U.S.C. § 909 (1984) reads: "If the injury causes death, the compensation shall be known as a death benefit . . ."

[12]The widow is entitled to benefits based on the statute in effect at the time of death, e.g. based on the 1972 LHWCA amendments. Puig v. Standard Dredging Co., 599 F.2d 467 (1st Cir. 1979); St. Louis Shipbuilding and Steel Co. v. Castell, 583 F.2d 876 (8th Cir. 1978), Hampton Roads Stevedoring Corp. v. O'Hearne, 184 F.2d 76 (4th Cir. 1950), Norfolk, Baltimore & Carolina Lines, Inc. v. Director, OWCP, 539 F.2d 378 (4th Cir. 1976).

permanent total disability occurred before, and death occurred after, the 1972 amendments.

Both Director v. Bath Iron Works, supra, p. 5, and Director v. Detroit Harbor Terminals, 850 F.2d 283 (6th Cir. 1988) examined this precise issue. Despite indistinguishable facts, the First and Sixth Circuits interpreted the critical statutory language differently and reached conflicting conclusions on whether § 910(h)(1) applies.

For the reasons set forth below, the Employer respectfully contends that this Court should grant this Petition for a Writ of Certiorari, hear this case on the merits, and adopt the ruling of the Sixth Circuit Court of Appeals in Detroit Harbor, (supra at p. 9).

ARGUMENT

I. BECAUSE OF THE LONG LATENCY OF MANY MARITIME INJURIES, THIS IS AN IMPORTANT CASE BECAUSE THERE ARE MANY CLAIMS AFFECTED.

In 1972, LHWCA covered 100,000 longshoremen and 700,000 other employees,[13] (118 Cong. Rec. 363823 10/14/72). Because of the large number of former and current shipyard workers, this is an important issue for this Court to address.

Occupational diseases, such as chronic obstructive pulmonary disease, asbestosis, and pneumonoconiosis typically have long latency periods.

> While only about 1,400 permanently and totally disabled workers who are believed to be living when the 1972 amendments became effective, the estimated benefits payable to this

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[13] These included District of Columbia construction workers and Americans employed on defense bases overseas.

survivors exceed three hundred million dollars. Pennsylvania National Mutual Casualty Insurance Company v. Spence: Insurer's liability for expanded coverage under the Longshore and Harbor Workers' Compensation Act, 66 Va. L.R. 827, 841 (1980).

> With active turnover during the war the total number of individuals employed in shipyards is estimated to be about 4 1/2 million. After the war the work force was reduced and has generally stayed at only several hundred thousand. There is, however, this residue of prior workers who are now about 30 years from the time of first exposure [to asbestos and other agents], and the excess disease problems that one might have expected are now being seen. Because of generally poor control measures in the past, this situation may be projected into the future for another several decades. Attorney's Textbook of Medicine, R.N. Gray, L.J. Gordy 3rd Ed (1980) §§ 205.11(2)

In addition to the large number of potential cases, there are actual cases currently in litigation involving precisely this issue.

II. THE FIRST AND SIXTH CIRCUIT COME TO COMPLETELY OPPOSITE CONCLUSIONS BASED ON IDENTICAL FACTS AND THEREFORE THE STATUTE MUST BE AMBIGUOUS.

A comparison of Bath Iron Works (supra, p. 3) with Detroit Harbor (supra, p. 9) shows the disparity between the circuit courts. The undisputed facts in Detroit Harbor (id.) are that Charles Dennis was permanently and totally disabled as the result of a work injury in October, 1969 (pre-1972 amendments). He received maximum benefits then allowable ($70.00 per week). With the 1972 amendments his permanent total disability benefits were increased according to § 910(h)(1). The employer and the insurer paid the increased benefits but were reimbursed b the § 944 fund. Dennis died in 1980 (post-1972 amendment). These facts are indistinguishable from the facts in the

instant case. At issue, exactly the same issue here, was who pays the resulting additional death benefits due under the 1972 amendments. The BRB, in conformity with prior decisions,[14] stated:

> We hold that § 910(h) applies to cases where injury occurs pre-amendment and death occurs post-amendment. There is no basis for distinguishing cases where pre-amendment injury results in post-amendment disability from those where death occurs post-amendment. Both disability and death claims arise from the employee's injury. The language of § 910(h) refers to both permanent total disability and death and the rationale of Hernandez and Silberstein[15] applies equally to both. [Dennis v. Detroit

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[14]Hernandez v. Base Billeting Fund, Laughlin AFB, 13 B.R.B.S. 214, and Silberstein v. Service Printing Co., 2 B.R.B.S. 143 (1975) held that § 910(h)(1) applies to claimant injured before, but permanently totally disabled after, the 1972 amendments and that the special fund pays the increase.

Fox v. Pacific Ship Repair, 21 B.R.B.S. 171 (1988) also held that § 910(h) applied to a pre-amendment disability/post-amendment death case identical to the instant case.

[15]Supra, note 14.

Harbor Terminals, 18 BRBS 250, 252, (1986) cited in Detroit Harbor, 850 F.2d at 287].

The BRB adhered to the holding in Dennis in Fox (supra, note 14). On review, the Sixth Circuit stated:

> The language of 33 U.S.C. § 910(h)(1), read in conjunction with the rest of the Longshoremen's Act fails to indicate with certainty whether Congress intended that death benefits awarded post-amendment from a pre-amendment injury should entitle the insurance carrier and employer to reimbursement from the special fund. In this regard, § 910(h)(1) is ambiguous and we must therefore look to its legislative history and underlying purposes to determine Congressional intent. (Detroit Harbor, 850 F.2d at 288.)

The Sixth Circuit continues after discussing the legislative history:

> Neither the statute nor the legislative history of the 1972 amendments clearly indicates the result that Congress intended under the situation here. We therefore must look to the underlying purpose and the manner in which it has been interpreted in the courts.

> There is no question that the main purpose of the 1972 amendments was to increase compensation to long neglected beneficiaries. However, Congress also made it clear that the rights of employers and insurance carriers would not be ignored. By amending 33 U.S.C. § 944 Congress set forth a clear plan of spreading the costs of the increases in disability and death benefits between the various insurance carriers and self-insured companies. Congress intended that the changes in benefits should not unduly harm an insurer or business whose actuarial planning was upset by the amendments. We view this as a classic case of congressional compromise. (Detroit Harbor, 850 F.2d at 291).

In the instant case, the First Circuit looked at the same statutory provision and said:

> In our view, this 'gap-closing' sentence [§ 910(h)(1)] does not apply in the case of a worker, injured before October, 1972. Our basic reason is that the language of the sentence **clearly** (emphasis added) excludes that case from its coverage. (Appendix A at 22]

This Court must consider whether the sentence in question, § 910(h)(1), is "clear" or "ambiguous".

The obvious conflict between the interpretation of the First Circuit on the one hand and the Sixth Circuit and the BRB on the other, compels a conclusion that the statute is not as clear as the First Circuit claims.

III. AN ANALYSIS OF THE LEGISLATIVE HISTORY SUPPORTS THE SIXTH CIRCUIT'S INTERPRETATION OF 33 U.S.C. §910.

LHWCA, originally passed in 1927, was amended in 1961 to allow benefits of 2/3 average weekly wage for permanent total disability, but imposed a $70.00/week cap maximum benefit. The 1972 LHWCA amendments removed the fixed cap and tied compensation to an annually determined national average weekly wage which substantially increased employee

benefits. The amendments provided, in addition, inflation offsetting cost-of-living (COLA) increases. The First Circuit discusses these changes in Section II of the Opinion (Appendix A).

A. Section 909 provides for death benefits arising from work-related injuries.

LHWCA § 909 (Appendix D) describes the types of benefits (funeral expenses and surviving spouse or dependent payments) awarded for deaths occurring after enactment of the 1972 amendments. Congress' clear intent in 1972 was to provide very generous increases in benefits for permanently totally disabled employees or their survivors. Congress then had to confront the problem of how to fund the increased benefits.

Congress recognized when the injury occurred after the 1972 Amendments, that the employer may raise premium rates to offset its increased financial burden. Since Congress intended to increase benefits for all permanently and totally disabled employees and their survivors, Congress' solution to the problem of how payments for pre-amendment injuries could be funded was § 910(h).

B. Section 910(h) is a special provision having a limited applicability to injuries preexisting the 1972 amendments.

Congress intended to increase benefits for disabled employees or their survivors regardless of the date of injury. To achieve this end, Congress authorized a special fund to pay the increased benefits due for permanent and total disability that preceded the 1972 amendments, while protecting employers

from retroactive losses.[16] Although not constitutionally required, Congress decided, as a matter of legislative policy, to provide this alternate funding mechanism, in recognition of the retroactive change in employer obligations created by the amendments. Section 910(h)(2) describes the source of payment, e.g., the special fund and government appropriations.

C. Congressional Hearings in 1972 did not extensively address the issue.

At hearings before the Committee on Labor and Public Welfare in May and June of 1972, it was not disputed that all permanently and totally disabled employees or their survivors were to be entitled to increased benefits. The arguments before the Committee involved questions of who would pay and how. The

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[16] § 944, Appendix D.

Secretary of Labor recommended that the committee consider "whether there is a need to establish a special fund to compensate insurers for increased benefit payments," (Appendix E.)

Ralph Hartman, Safety and Workers' Compensation Division, Bethlehem Steel Company, testified regarding the special fund designed to increase benefits of beneficiaries already on the rolls as of the effective date of the new legislation, and argued that the mechanism provided for financing the funds were "objectionable" and "inequitable". (Appendix E). Edward D. Vickery testified on behalf of the National Maritime Compensation Committee. Since the First Circuit relied heavily on the testimony of Mr. Vickery, it is appropriate to study it in greater detail.

Making retroactive increases in the weekly compensation rates as this proposed amendment [S 2318] presents problems which we believe are insurmountable insofar as the fixing of insurance premium rates with the setting of reserves for self-insurers under the Act are concerned . . . It is the retroactive nature of the amendment in its present form which is, we submit, unworkable, and we believe will make it extremely difficult, if not impossible, to obtain insurance coverage under the Act. The uncertainties and substantial speculation which insurance carriers would have to engage in insofar as their rates are concerned - - trying to anticipate increases that would occur over a period of twenty or thirty years or more - - simply makes this provision unworkable as long as it is made retroactive. Thus in any amendment to provide for automatic increases in weekly compensation benefits on an annual basis, the National Maritime Compensation Committee believes it is important for the amendment to expressly provide that the increased weekly compensation rate shall apply only to injuries sustained after the effective date of the new rate and only to deaths resulting from injuries sustained after the effective date of the new rate.

(Longshore and Harbor Workers Compensation Act, Amendments of 1972, 92d Cong. 2d Sess. (1972)).

Section 910 was the response of Congress to these specific concerns. It was added in September, 1972, several months after Vickery's testimony.

It is clear Congress intended to increase benefits and intended the special fund and appropriations pay where increases applied to pre-enactment injuries. This is the interpretation of the legislative history adopted by the BRB and the Sixth Circuit.

The statute has been in effect for 17 years. Its consistent interpretation by the BRB, the administrative appellate body charged with administration of LHWCA, has been affirmed by the Sixth Circuit in Detroit Harbor. Now the First Circuit applies a novel construction, at odds with the line of BRB decisions,[17]

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[17] Silberstein v. Service Printing Co., Inc., 2 B.R.B.S. 143 (1975); Hernandez v. Base Billeting Fund, Laughlin AFB, 13

the Sixth Circuit, and Congressional intent, that the retroactive increases are to be paid by the employer and not the fund Congress established for such payments. Congress reevaluated the statute in 1984 and, although the "unrelated death" provision was removed,[18] Congress did not change the language of § 910(h)(1). Had Congress been dissatisfied with the BRB interpretation of § 910(h)(1), the 1984 amendments provided the opportunity for further redrafting of § 910(h)(1).

IV. THE ANALYSIS THE FIRST CIRCUIT APPLIES TO 33 U.S.C. § 910 IS INCONSISTENT AND SERVES TO FRUSTRATE CONGRESSIONAL INTENT

B.R.B.S. 214 91980); Fox v. Pacific Ship Repair, 21 B.R.B.S. 171 (1988), See also, footnote #14.

[18] See Footnote #11.

Congress had two purposes when it amended § 910. The first was to increase benefits for all permanently totally disabled employees and their survivors. The second was to spread the costs of these increased benefits among insurers, the industry, and the government by use of the special fund and appropriations (118 Cong. Rec. 36376-89 10/14/72). The critical language reads as follows:

> . . . The compensation to which an employee or his survivor is entitled due to total permanent disability or death which commenced or occurred prior to [enactment of this subsection] shall be adjusted. 33 U.S.C. 910(h)(1) 1972.

The First Circuit, asserting that this language is clear and unambiguous, ruled that § 910 did not apply to the instant case because the death occurred after the enactment of the 1972 Amendments. The Court concluded that a literal reading of § 910 was consistent with congressional

intent because it did not adversely affect the survivors, since death benefits are determined as of the date of death. The Court recognized, however, that if the whole statutory provision were read literally, an employee, injured prior to enactment of the 1972 Amendments, with permanent and total disability commencing after 1972 would not be entitled to the 1972 Amendment increases.

This result, inconsistent with Congressional intent, was unacceptable to the First Circuit. The First Circuit solved this problem by holding that the statutory language ". . . total permanent disability . . . which commenced . . ." really means injury which commenced prior to enactment. The First Circuit is inconsistent when it asserts that the statutory language is clear, yet then

substitutes words with specialized and distinct meaning within the statute to accomplish the undisputed intent of Congress.[19]

Additionally, this portion of the First Circuit's analysis further Congress' first objective: to increase benefits to all affected employees or survivors. The Court then, however, reads the death benefits portion of the statute literally, which frustrates Congress' intent to distribute the costs.

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[19]Section 902 defines injury, disability, and death independently. § 902(2): ". . . 'injury' means accidental injury or death arising out of and in the course of employment . . . "; § 902(10) " 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."; § 902(11) " 'death' as a basis for a right to compensation means only death resulting from an injury."

The First Circuit applied this analysis only to funding of benefits for total permanent disability while the Sixth Circuit applied the same analysis to funding for benefits for both permanent total disability and death.

Nothing in the legislative history or statute's literal language justifies the First Circuit's disparate treatment of permanent total disability and death. The Sixth Circuit's uniform analysis of permanent total disability and death benefits accomplishes both of the objectives of Congress and recognizes that the sentence involved is ambiguous. The Sixth Circuit's analysis is consistent with the rules of statutory construction articulated in U.S. v. American Trucking Association, 310 U.S. 534, 542 (1940).

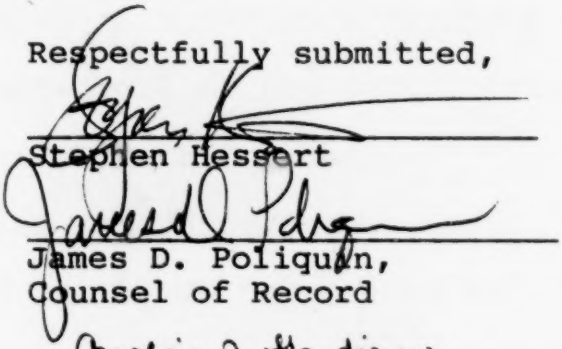
CONCLUSION

This case affects many claims for benefits for permanent total disability and death arising out of maritime occupational diseases which were manifest before 1972 but not disabling until many years later.

The First Circuit's analysis of Section 910(h)(1) is at odds with that of the Sixth Circuit and BRB. This has resulted in opposite conclusions of law on identical findings of fact. The First Circuit's interpretation frustrates Congress' intent to increase benefits and to distribute financial responsibility across the industry and government. Petitioner respectfully requests a Writ of Certiorari issue so that this Court

can hear this case on the merits and resolve the conflict among the Circuit Courts of Appeal.

Respectfully submitted,



Stephen Hessert

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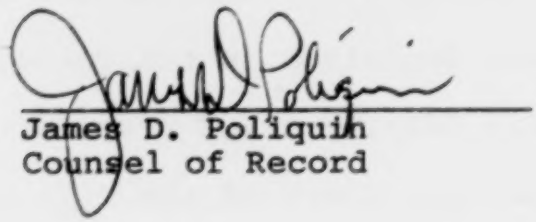
CERTIFICATE OF SERVICE

The undersigned hereby certify that 40 (forty) copies of the within Petition for Writ of Certiorari of the Petitioners Bath Iron Works Corporation and Commercial Union Insurance Company have been deposited in the United States Mail this date, postage prepaid, to Joseph F. Spaniol, Clerk of the U.S. Supreme Court, 1st Street, N.W., Washington, D.C., 20543. Three copies of the Petition were served upon the Solicitor General, Department of Justice, Washington, D.C., 20530, Joshua T. Gillelan, II, Attorney U.S. Department of Labor, Office of the Solicitor, Francis Perkins Building, Suite N-2620, 200 Constitution Avenue, N.W., Washington, D.C. 20210, Jerry G. Thorn, Esq., Carol A. DeDeo, Esq., and J. Michael O'Neill, Esq., U.S. Department of

Labor, Office of the Solicitor, Frances Perkins Building, Suite N-2620, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

Dated: December 19, 1989.

NORMAN, HANSON & DeTROY



James D. Poliquin
Counsel of Record

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 89-1126

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

BATH IRON WORKS CORPORATION, ET AL.,

Respondents

ON PETITION FOR REVIEW OF AN ORDER OF

THE BENEFITS REVIEW BOARD

Before

Breyer and Selya, Circuit Judges,

and Caffrey,* Senior District Judge.

Joshua T. Gillelan II, Department of Labor, Office of the Solicitor, with whom Jerry G. Thorn, Acting Solicitor of Labor, Carol A. De Deo, Associate Solicitor, and J. Michael O'Neill, Counsel for Longshore, were on brief for petitioner.

Stephen Hessert with whom Michelle Jodoin LaFond and Norman, Hanson & DeTroy were on brief for respondents.

September 20, 1989

*Of the District of Massachusetts, sitting by designation

BREYER, Circuit Judge. Edwin Lebel painted ships; in 1971 he became disabled because of a work-related disease; and, in 1983, he died. As a result the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-950 (1982), entitled his widow to death benefits. The legal question before us is who must pay that portion of the benefits resulting from a benefit-rate increase that took effect in 1972, when the LHWCA was amended to make it more generous. See LHWCA Amendments of 1972, Pub. L. No. 92-576, 86. Stat. 1251 (codified in scattered sections of 33 U.S.C. §§ 902-948a (1982). (Subsequent amendments do not concern us.) If this portion of the benefit is a special "adjustment" that falls within the scope of § 10(h)(1) of the amended statute, the federal government and a special fund

must pay its cost; if this portion of the benefit is not a special "adjustment," the employer (or his insurer) must pay. See 33 U.S.C. §§ 910(h)(1)-(2) (1982). (In the course of this opinion we refer frequently to the text of various statutory provisions. These provisions are set forth in an appendix.)

The answer to this legal question lies hidden in the words of a single sentence in § 910(h)(1) of the 1972 statute. That sentence, which we shall call the "gap-closing" sentence, says,

> the compensation to which an employee or his survivor is entitled due to total permanent disability or death which commenced or occurred prior to [enactment of this subsection] shall be adjusted.

33 U.S.C. § 910(h)(1) (1982). Is the portion of benefits here at issue the type of "adjust[ment]" to which the

sentence refers? After considering the 1972 amendments and their history, we conclude that this sentence does not cover the benefits paid to the survivor of a person who was injured before 1972, but who died after 1972. Consequently, the employer (or his insurer) must pay the disputed portion of the benefits.

I

Background

The Longshoremen's and Harbor Workers' Compensation Act provides that employers must pay benefits to covered workers (or their survivors) who are disabled or killed by a work-related injury or illness. A worker seeking benefits under the LHWCA files notice of the injury with his employer, see 33 U.S.C. § 912 (1982), who must begin compensating the worker according to the

terms of the statute, see id. § 914. If a dispute arises, either party notifies a deputy commissioner of the Office of Workers' Compensation Programs, see id. §§ 914(d), 919(a), who investigates and, if either party requests it, orders a hearing before an administrative law judge, see id. §§ 919(b)-(d). A party can appeal to the Benefits Review Board, see id. § 921(b)(3), and then to the United States courts of appeals, see id. § 921(c).

This case arose when Edwin Lebel's widow and son sought death benefits from Lebel's employer, Bath Iron Works (Bath), after Lebel's death in 1983. Bath refused to pay, but an ALJ, after a hearing, made an award. According to the death-benefits provision then in effect, 33 U.S.C. § 909 (1982), Lebel's widow and son were entitled to compensation at an initial rate of 66 2/3 percent of his

average weekly wages, which "shall be considered to have been not less than the applicable national average weekly wage" at the time of death, except that "the total weekly benefits shall not exceed the average weekly wages of the deceased.: Id. § 909(e). Since 66 2/3 percent of the national average weekly wage exceeded Lebel's average weekly wages of $173.58, the ALJ awarded the latter amount. The ALJ also awarded a yearly cost-of-living adjustment, pursuant to § 10(f) of the amended statute. See id. § 910(f).

The Benefits Review Board modified the award in an unpublished 1988 opinion. Lebel v. Bath Iron Works, BRB No. 86-429 (Nov. 30, 1988). Adhering to its decision in Dennis v. Detroit Harbor Terminals, Inc., 18 B.R.B.S. 250 (1986), aff'd sub nom. Director, OWCP v. Detroit Harbor Terminals, Inc., 850 F.2d 283 (6th

Cir. 1988), the Board held that § 10(h)(1) of the 1972 statute, which we shall call the "gap-closing" section, applied in this case of a pre-1972 injury resulting in a post-1972 death. Applying § 10(h)(1) and related §§ 10(h)(2)-(3), the Board held that Bath Iron Works was liable only for the first $36.75 per week of death benefits (the amount that, the Board said, the employer would have paid under pre-1972 law), and that the remainder of the benefits, as well as the annual cost-of-living adjustment, must be paid partly out of a special fund financed by all employers covered by the LHWCA, and partly out of government appropriations. See 33 U.S.C. § 910(h)(1)-(3). The Director appeals from the Board's decision, contending that Bath Iron Works ought to pay the full amount of the death benefits, except for the cost-of-living adjustment, which the

Director concedes that the special fund and the government must pay. We now reverse the decision of the Board. We agree with the Director that Bath must pay.

II.

The 1972 Amendments to the LHWCA

Congress enacted the complicated 1972 amendments to the LHWCA to expand its coverage, make benefit payments for total disability and death more generous, and to provide automatic cost-of-living adjustments (COLAs) to protect beneficiaries from inflation. Of particular concern to us are the "generosity" and "cost-of-living" adjustments. Once one understands how Congress rewrote the statute to achieve

these purposes, it becomes easier to interpret properly the "gap-closing" sentence here at issue.

1. Generosity. The LHWCA, in both its pre- and post-1972 versions, requires the employer to compensate covered workers who are killed or disabled by work-related injuries. Benefits (and here we are concerned only with benefits that take the form of weekly payments) are calculated as a percentage of the worker's "average weekly wages" in the year preceding the injury. The statute also provides a ceiling on benefits, and, before 1972, that ceiling was very low. In 1972 Congress raised various benefit ceilings, increased benefit rates, and introduced assumptions about "average weekly wages" that made benefits more generous.

a. Before 1972. Before 1972, the statute fixed compensation for permanent total disability at 66 2/3 percent of the worker's average weekly wages, but it imposed very low minimum and maximum benefit rates of $18 per week and $70 per week, respectively. See LHWCA Amendments of 1961, Pub. L. No. 87-87 § 1, 75 Stat. 203 (setting $70 per week maximum); Act of July 26, 1956, § 1, 70 Stat. 654 (setting $18 per week minimum). It fixed death benefits (weekly payments for a surviving spouse and dependent child) at 50 percent of the average weekly wage, but it imposed a very low ceiling (of $52.50) by specifying that "the average weekly wages of the deceased shall be considered to have been not more than $105.00" LHWCA Amendments of 1961, supra, Section 2 (setting $52.50 ceiling).

b. After 1972. The 1972 amendments replaced the old $70 ceiling on total disability benefits with a new ceiling calculated as a percentage of the "national average weekly wage," a figure that the Secretary of Labor must determine each year. See LHWCA Amendments of 1972, Pub. L. No. 92-576, § 5(a), 86 Stat. 1251, 1252 (codified at 33 U.S.C. § 906(b)-(d) (1982). The ceiling increased gradually for 125 percent of the national average weekly wage in 1972-1973 to 200 percent for years after 1975. See id. The amended statute raised the minimum compensation rate for total disability from $18 per week to 50 percent of the national average weekly wage or the worker's average weekly wage, whichever was less. See id. In regard to death benefits, the 1972 amendments made the statute more generous by increasing the percentage of the worker's

"average weekly wage" payable to his survivors from 50 percent (for spouse with dependent child) to 66 2/3 percent, see id., §§ 10(b), 20(c)(2), 86 Stat. 1251, 1257, 1265 (codified at 33 U.S.C. § 909(b)-(c) (1982)), and by specifying that "the average weekly wages of the deceased shall be considered to have been not less than the applicable national average weekly wage," id. § 10(d) (codified at 33 U.S.C. § 909(e) (1982)). It also removed the old benefits ceiling of $52.50, specifying instead that "the total weekly benefits shall not exceed the average weekly wages of the deceased." Id. These changes in the calculation of death benefits, which are important in the context of this case, mean that, under the amended law, a surviving spouse and dependent child are always entitled to 66 2/3 percent of the national average weekly wage at the time

of death or the decedent's average weekly wage at the time of the injury, whichever is less.

2. Inflation. The 1972 amendments also helped beneficiaries by providing for automatic cost-of-living adjustments. Section 10(f) of the amended statute, which we shall call the "post-1972 COLA" provision, states that,

> Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries sustained after [this section was enacted] shall be increased by . . . [the extent to which the] national [average] weekly wage . . . exceeds the . . . national average weekly wage [for the preceding year] . . . .

LHWCA Amendment of 1972, supra, § 11 (codified at 33 U.S.C. § 910(f) (1982.)

3. Pre-1972 injuries and benefits. The drafters of the 1972 amendments decided that the newer, more generous statutory terms should also apply to pre-1972 cases of disability and

death. Consequently, the amended statute (1) makes certain that workers injured before 1972 benefit from the "post-1972 COLA" provision, and (2) closes the "gap" (between benefits paid in pre-1972 cases and benefits paid in post-1972 cases) through a one-time adjustment. Finally, it provides that the COLAs and the one-time gap closing adjustment applicable to pre-1972 cases be paid half from government appropriations and half from a special fund.

a. Post-1972 inflation. To make certain that pre-1972 cases obtained post-1972 cost-of-living adjustments, Congress added § 10(h)(3) to the statute, which says,

> For the purposes of subsection[] (f) [the "post-1972 COLA" provision] . . . an injury which resulted in permanent total disability or death which occurred prior to [the date this section was enacted] shall be considered to have occurred on the day following such date.

LHWCA Amendments of 1972, supra, § 11 (codified at 33 U.S.C. § 910(h)(3) (1982). These words call into play § 910(f), the "post-1972 COLA" provision, which otherwise (because of the words "injuries sustained after," see [Section II (2) of Opinion] supra, would not apply. These words mean that, beginning in 1972, benefits paid for injuries that occurred before October 1972 receive the same post-1972 annual cost-of-living adjustment as benefits paid for injuries occurring after 1972.

b. The Pre-1972 gap. Congress also adjusted pre-1972 benefits to make up (1) for the fact that post-1972 benefits were more generous and (2) for inflation that took place between the time the worker began receiving compensation and 1972 (when the "post-1972 COLA" provision takes over). A worker who died before 1972 left his family no more than $52.50

per week (50 percent of his average weekly wage, which "shall be considered to have been not more than $105." Pub. L. No. 87-87, § 2, 75 Stat. 203 (1961)). The "post-1972 COLA" provision, § 10(f), provides the survivors receiving this $52.50 benefit with an annual increase that reflects inflation that takes place after 1972. See 33 U.S.C. § 910(f) (1982). But what about inflation that took place between 1966 and 1972? And what about the fact that the post-1972 death benefit is far more generous than the $52.50 the survivors began to receive in 1966?

Congress adjusted benefits in these pre-1972 cases to make them equivalent to post-1972 benefits in both respects by enacting the "gap-closing" section mentioned earlier, § 10(h)(1), [I of Opinion] supra. That section applies to cases specified in its first sentence,

the "gap-closing" sentence, which we set forth at the beginning of this opinion, [I of Opinion] supra. The section provides a one-time adjustment of benefits paid in pre-1972 cases

> by designating as the employee's average weekly wage the applicable national average weekly wage . . . and . . . computing the compensation to which such employee or survivor would be entitled if the disabling injury or death had occurred on the day [after this section's enactment] . . . and . . .subtracting therefrom the compensation to which such employee or survivor was entitled [just before this section was enacted].

33 U.S.C. § 910(h)(1) (1982). These words say: (1) Calculate what the survivor of the worker who died, say, in 1966 would have received if (a) his weekly wage had equaled the 1972 "national average" and (b) the benefit had been calculated under the new, 1972 statute. (2) Subtract from this amount what his survivors actually were

receiving (probably the maximum death benefit, $52.50 per week). The result is the "adjustment."

c. Government appropriations and the special fund. Finally, Congress decided that payment for the enhanced benefits in pre-1972 cases would come half from government appropriations and half from a special fund to which employers would contribute. Section 10(h)(2) of the amended statute provides that,

> Fifty per centum of any additional compensation or death benefit paid as a result of the adjustment required by [subsections 10(h)(1) and 10(h)(3)] . . . shall be paid out of the special fund . . . and 50 per centum shall be paid from appropriations

33 U.S.C. § 910(h)(2) (1982). This section cross-references §§ 10(h)(1) and 10(h)(3), both discussed earlier, [I, II(3)(a) of Opinion], supra. Section 10(h)(1) (the "gap-closing" section)

closes the inflation and benefit-rate gap between pre-1972 and post-1972 cases; and § 10(h)(3) applies the "post-1972 COLA" provision to pre-1972 cases. Section 10(h)(2) makes the government and special fund liable for all benefit-enhancements in cases covered by §§ 10(h)(1) and 10(h)(3).

To summarize, the 1972 amendments a) made disability and death benefits more generous, b) indexed the benefits for post-1972 inflation, c) made certain that benefits tied to pre-1972 injuries were similarly indexed for post-1972 inflation, and d) made certain that benefits in pre-1972 cases were paid at the new statutory rates. It also provided that the government and a special fund would pay for "c" and "d". The exact scope of "d" is the issue in this case.

III

The Legal Issue

Now we can turn to the sentence that governs the legal issue before us, the sentence in the "gap-closing" section that specifies to precisely which benefits the "gap-closing" adjustment applies. We shall repeat that sentence, emphasizing the language here relevant:

> . . . the compensation to which an employee or his survivor is entitled due to total permanent disability or death which commenced or occurred prior to [enactment of this subsection] shall be adjusted.

33 U.S.C. § 910(h)(1) (1982). The issue in this case is whether this statutory provision, providing for a gap-closing adjustment, applies to the case of a worker who was injured before 1972, but who died after 1972. (The parties agree that, through § 10(h)(3), the "post-1972 COLA" provision, § 10(f), applies in this

case, and that, because of the "government/fund pays" provision, § 10(h)(2), the government and fund will pay the cost of these annual adjustments.) If the "gap-closing" provision, § 10(h)(1), applies to this case, the government and fund must pay the cost of the adjustment, for the "government/fund pays' provision, § 10(h)(2), makes the government and special fund liable for all cases covered by § 10(h)(1). (As we shall see, if the "government/fund" does not pay, the employer must pay.)

In our view, this "gap-closing" sentence does <u>not</u> apply in the case of a worker, injured before October 1972, who died after October 1972. Our basic reason is that the language of the sentence clearly excludes that case from its coverage. The sentence says that the adjustment applies when the "total

permanent disability or death . . . commenced or occurred" before October 1972. The death of a worker who died after 1972 did not "occur" before 1972. And we do not see how such a death can be said to have "commenced" before 1972. But see Director, OWCP v. Detroit Harbor Terminals, Inc., 850 F.2d 283, 288 (6th Cir. 1988). On the contrary, the place of the word "commenced" in the sentence suggests that it applies to the words "total disability" rather than the word "death." When the words of a statute are clear, a court must apply them. See United States v. American Trucking Ass'ns, 310 U.S. 534, 543 (1940) ("There is, of course, no more persuasive evidence of the purpose of a statute than the works by which the legislature undertook to give expression to

its wishes."); see also United States v. James, 478 U.S. 597, 604 (1986); CPSC v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980; Allende v. Shultz, 845 F.2d 1111, 1116-17 (1st Cir. 1988).

We also believe (and this is why we have explained the statute in such detail) that the statute makes perfectly good sense interpreted this way. The main purpose of the 1972 amendments was to increase benefits under the LHWCA. Section 10(h)(1) helps carry out this purpose by increasing benefits for workers (or their survivors) who became entitled to benefits when the pre-1972 rates still applied. But the family of a worker injured before 1972 who dies after 1972 is entitled anyway to benefits at the generous, post-1972 rates (i.e., 66 2/3 percent of the decedent's salary, which "shall be considered to have been not less than the . . . national average

weekly wage" at the time of death, 33 U.S.C. § 909 (1982)). Neither party disputes that this is so, and we have held as much. See Puig v. Standard Dredging Corp., 599 F.2d 467, 470 (1st Cir. 1979) (death benefits under the LHWCA are calculated according to the death benefit provisions in effect at the time of death). Since the family of a worker injured before 1972 who dies after 1972 is entitled to benefits at the post-1972 rates, no "gap" exists in his case, and the "gap-closing" provision, § 10(h)(1), simply does not apply.

The survivors of a worker injured before 1972 who dies after 1972 will, as we have previously pointed out, also receive post-1972 COLAs. Although the "post-1972 COLA" provision, § 10(f), applies only to deaths "arising out of injuries sustained after" 1972, special

provision 10(h)(3) makes the "post-1972 COLA" provision apply also to deaths arising from pre-1972 injuries, for it applies when an "injury" (which resulted in permanent total disability or death) "occurred prior to" 1972. And, as we have also pointed out, § 10(h)(2) charges those post-1972 COLAs to the government and the special fund.

The result is not a statute that seems to contain drafting errors; rather, it is a statute that seems to have been drafted with care to carry out a complex purpose. It applies both 1972's "cost-of-living" and "generosity" adjustments to workers injured before 1972. In the case of a worker (or his survivors) receiving disability benefits at the pre-1972 rates, it charges the cost of applying post-1972 COLAs to the government and the special fund, and it closes the gap between the pre-1972 and

post-1972 level of benefits by means of a one-time adjustment that is also charged to the government and the special fund. In the case of a worker injured before 1972 who dies after 1972, however, it does not pay for a "gap" adjustment from the "government/special fund" sources, because no "gap" exists in such a case. Death benefits in cases of pre-1972 injury, post-1972 death are calculated for the first time at the time of death. And, that calculation provides the survivors with benefits at the generous, post-1972 rates.

The statute's language is complex, but the problem with which it tries to deal is complex as well, and we cannot find any obvious drafting mistake in the language. Faced with language that is fairly clear and a statute that makes reasonable sense when one gives the statute's words their natural meaning, we

must apply the statute as it is written. Bath makes three contrary arguments. First, Bath argues that the statute's legislative history shows that Congress recognized that increasing benefits in respect to persons injured before 1972 meant requiring insurance companies to pay more money than they had calculated they would have to pay when they set their premiums; and, for this reason, Congress intended to pay for such increases from government appropriations and the special fund. Bath adds that, in this respect, a pre-1972-injury, post-1972-death case poses as much of a "premium calculation" problem as any other upward adjustment in benefits for pre-1972 injuries.

The problem with Bath's argument, however, is that the legislative history does not offer it much support. For one thing, the House and Senate Reports on

the bill state in identical terms that it adds a separate provision "to increase future benefits to . . . those people who have been receiving compensation or benefits for total disability or death . . . " See H.R. Rep. No. 1441, 92d Cong., 2d Sess. 3 (1972), reprinted in 1972 U.S. Code Cong. & Admin News 4698, 4702 [hereinafter House Report]; S. Rep. No. 1125, 92d Cong., 2d Sess. 6 (1972) [hereinafter Senate Report] (emphasis added). The underlined words obviously do not include those who were not yet dead as of 1972. Similarly, the House Report states that the "uses to which the special fund may be put" have been expanded to include adjustments "for permanent total disabling injuries or deaths occurring prior to the date of enactment." House Report at 18, 1972 U.S. Code Cong. & Admin. News at 4715 (emphasis added). Again, the underlined

words do not encompass post-1972 deaths. In a section-by-section analysis of the bill, the Senate Report states, "Subsection [10](h)(1) provides that employees or survivors already receiving payments under the Act as a result of total permanent disability or death, would have their future compensation adjusted . . . " Senate Report at 22. And Congressman Steiger, describing "costs to the Federal Government" from the bill on the floor of the House, explained that government appropriations would pay for half "the increase in benefits for those persons who . . . are widows or survivors . . . prior to enactment of this bill." 118 Cong. Rec. 36,386 (Oct. 14, 1972) (emphasis added). Indeed, even the employers' representative who first suggested to Congress that it update benefits in pre-1972 cases referred to "those employees .

. . who are permanently totally disabled and the widows of employees . . . on the rolls as of [1972]." Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972: Hearings on S. 2318, 525 & 1547 Before the Subcomm. on Labor of the Senate Committee on Labor and Public Welfare, 92.d Cong., 2d Sess. 172 (1972) [hereinafter, Hearings] (statement of Ralph Hartman, Asst. Manager, Safety and Workmen's Compensation Division, Bethlehem Steel Corp.). All these descriptions of the "gap-closing section," § 10(h)(1), suggest that Congress intended it only to adjust disability benefits for pre-1972 injuries, and to adjust death benefits for pre-1972 deaths. None of the congressional material implies that § 10(h)(1) was intended also to adjust death benefits in pre-1972 injury, post-1972 death cases.

For another thing, as Bath correctly points out, Congress did hear testimony that imposing "retroactive" benefits adjustments on employers would make it difficult for insurers to set premium rates. One industry witness, for example, argued that "retroactive increases in the weekly compensation rates: would create "problems which we believe are insurmountable insofar as the fixing of insurance premium rates or the setting or reserves for self-insurors [sic] under the Act are concerned." Hearings at 342 (statement of Edward D. Vickery, Esq.). And Secretary of Labor James Hodgson urged the committee to consider "whether there is a need to establish a special fund to compensate insurers for increased benefit payments." Hearings at 32. But both of these witnesses were referring to the "post-1972 COLA" provision as applied to cases

of post-1972 injury; neither was commenting on the "gap-closing" provision, § 10(h)(1), or the provision applying "post-1972 COLAs" to cases of pre-1972 injury, § 10(h)(3), which were not added to the proposed legislation until several months later. Thus, no witness ever expressed the concern that imposing the new death benefit rates in pre-1972 injury cases would present insurance problems.

Finally, Congress has often awarded benefit increases or given the benefit of more generous legal rules to those injured in the past even though the employer or insurer might have to foot the bill. On the three previous occasions when Congress raised death benefits under the LHWCA in 1948, 1956, and 1961, it expressly provided that the new death benefit would apply to all deaths occurring after the amendments

took effect, see LHWCA Amendments of 1961, Pub. L. No. 87-87,§4, 75 Stat. 203 (1961); Act of July 26, 1956, §9, 70 Stat. 655; Act of June 24, 1948, § 6, 62 Stat. 302, but it did not compensate employers for the increased benefit payments. After the 1948 amendments, several courts rejected challenges to the application of the new death benefit rates to pre-amendment injury cases, see, e.g., Travelers Ins. Co. v. Toner, 190 F.2d 30, 31 D.C. Cir.) (per curiam), cert. denied, 342 U.S. 826 (1951); Hampton Roads Stevedoring Corp. v. O'Hearne, 184 F.2d 76, 78-81 (4th Cir. 1950); Penn Jersey Welding Co. v. Lowe, 183 F.2d 936, 937 (3rd Cir. 1950), and no similar challenges to the 1956 or 1961 amendments have come to our attention. Likewise, when Congress again amended the death benefit rates in 1984, it said that the new rates "shall apply with respect

to any death after the date of enactment." See LHWCA Amendments of 1984, Pub. L. No. 98-426, §§ 28(d), 98 Stat. 1639. Similarly, the new "unrelated death" provision of the 1972 statute provided, for the first time, that an employer must pay death benefits to an injured employee even if the employee "dies from causes other than the [employment-related] injury." LHWCA Amendments of 1972, Pub. L. No. 92-576, § 5(d), 86 Stat. 1251, 1253 (codified at 33 U.S.C. § 909 (1982)), repealed by LHWCA Amendments of 1984, Publ. L. 98-426, § 9(a), 98 Stat. 1639, 1647. Courts have consistently upheld application of this provision to pre-1972 injury, post-1972 death cases, relying on the general rule that an employer must pay death benefits under the law in effect at the time of death, regardless of the date of injury. See, e.g., Travelers Ins. Co. v.

Marshall, 634 F.2d 843, 847 (5th Cir. 1981); Puig v. Standard Dredging Corp., 599 F.2d at 469-70; Todd Shipyards Corp. v. Witthuhn, 596 F.2d 899, 901-02 (9th Cir. 1979); Pennsylvania Nat'l Mutual Casualty Ins. Co. v. Spence, 591 F.2d 985, 986 (4th Cir.), cert. denied, 444 U.S. 963 (1979). The language in § 10(h)(1) indicates that Congress once again did not intend to compensate employers or their insurers for post-amendment death benefits linked to pre-amendment injuries. The legislative history is nowhere near strong enough to warrant a conclusion that Congress meant to do something other, in respect to post-1972 deaths, than what this language says. If this language was a drafting error, the time for employer representatives to catch, and to correct, that error was before the bill became law, not after.

Second, Bath points to a line of Board decisions, accepted as correct by the Director, which holds that the "gap-closing" sentence (making applicable the "gap-closing" section and the § 10(h)(2) "government/fund pays" provision) applies to an employee whose pre-1972 injury results in a post-1972 total permanent disability. See Silberstein v. Service Printing Co., 2 B.R.B.S. 143 (1975); see also Verderane v. Jacksonville Shipyards, Inc., 14 B.R.B.S. 220 (1981) ("[W]here claimant is injured prior to the date of enactment of the 1972 amendments and disabled after that date, he is treated as if the injury and disability occurred pre-amendment."); Hernandez v. Base Billeting Fund, 13 B.R.B.S. 214 (1980), modified on reconsideration, 13 B.R.B.S. 220 (1981); Mitchell v. Lake Charles Stevedores, Inc., 5 B.R.B.S. 777 (1977). At first blush, the gap-closing sentence

would seem not to apply to these cases, since it covers only "total permanent disability . . . which commenced . . . prior to [enactment]" 33 § 910(h)(1) (1982). If the "gap-closing" sentence is read to cover pre-1972 injury, post-1972 permanent total disability cases, Bath asks, why not pre-1972 injury, post-1972 death cases?

The answer is that the "gap-closing" sentence must be read to cover workers injured before 1972 who become permanently and totally disabled after 1972 in order to effectuate a basic purpose of the 1972 amendments, namely, to close the inflation and "generosity" gap between benefits paid at pre-1972 rates and those paid at post-1972 rates. To understand why this is so, one must refer back to our description of the 1972 amendments that increased benefits for permanent total disability. See

[II(1)(b) of Opinion] supra. These amendments simply raised the maximum benefit form $70 per week to 200 percent of the national average weekly wage, and raised the minimum benefit from $18 per week to the lesser of 50 percent of the national average and the worker's average weekly wage. See 33 U.S.C. § 906(b) (1982). They did not, however, change the basic formula for calculating the benefit, namely, 66 2/3 percent of the worker's actual average weekly wage at the time of injury. See id. § 908 ("Compensation for . . . total disability adjudged to be permanent [is] . . . 66 2/3 per centum of the [worker's] average weekly wages . . . ."); id. § 910 ("Except as otherwise provided in this chapter, the average weekly wages of the injured employee at the time of the injury shall be taken as the basis on

which to compute compensation . . . ")
Aside from the new minimum benefit provision,
§ 6(b)(2), which in many cases (i.e., where the worker's pre-1972 wages were extremely low) will not be of much help, the only language in the 1972 statute that would adjust this pre-1972 wage upward for purposes of calculating permanent total disability payment is the language found in the "gap-closing" section, § 10(h)(1). Thus, to make the permanent total disability benefits of a worker injured before 1972 commensurate with those of a worker injured after 1972, one must find authorization in the "gap-closing" section or one cannot find it at all. (One exception to this statement is the worker whose pre-1972 average weekly wage exceeded the 1972 national average weekly wage. Such a worker would be better off if his

benefits were simply recalculated according to the post-1972 rates rather than adjusted according to the formula in § 10(h)(1), since 10(h)(1) assumes for purposes of adjustment that the worker's average weekly wage was equal to the 1972 national average weekly wage. The existence of § 10(h)(1), however, whose clear purpose is to close the benefit-rate and inflation "gap" in cases of pre-1972 injury, indicates that Congress thought that cases like these would be relatively rare. And the Board and courts have consistently held that § 910(h)(1) was meant to be the sole method of adjustment in cases of pre-1972 injury. See, e.g., Landrum v. Air America, Inc., 534 F.2d 67, 69-70 (5th Cir. 1976); Lebel v. Bath Iron Works Corp., 3 B.R.B.S. 216 (1976), aff'd, 544 F.2d 1112 (1st Cir. 1976)).

In this respect the post-1972 provision for calculating death benefits, §9, is critically different. If the "gap-closing" section, 10(h)(1), does not apply to a pre-1972 injury, post-1972 death case, the decedent's survivors will nonetheless receive benefits at generous post-1972 rates (though the employer will pay them), because 9(e) calculates death benefits as a percentage of the worker's average weekly wage at the time of his (post-1972) death, not his pre-1972 injury; and it further specifies that these wages "shall be considered to have been not less than the applicable national average weekly wage" at the time of death. One must simply reread the relevant sections, which we have discussed several times, See [II of Opinion] supra; Appendix, infra, to see how this is so.

To summarize, if one reads the "gap-closing" sentence to exclude workers injured before 1972 who die after 1972, the result is simply that the entire death benefit, calculated according to the generous, post-1972 rates, must be paid by the employer, instead of part being paid by the government and the special fund. But, if one reads that sentence to exclude workers whose post-1972 disabilities result from pre-1972 injuries, the result is that these workers would not benefit from the "generosity" and inflation adjustments made to the 1972 statute. The latter outcome runs far more strongly contrary to the statute's basic "benefit update" purposes than does the former.

At the same time, the words of the "gap-closing" sentence can be read to include the post-1972 disability case and exclude the post-1972 death case. That sentence brings within the reach of § 10(h)(1) cases of "total permanent disability or death which commenced" prior to the enactment of the subsection in 1972. 33 U.S.C. § 910(h)(1) (1982). It is more natural to think of a post-1972 total disability arising out of a pre-1972 injury as having "commenced" before 1972 than it is to think of a post-1972 death as having "commenced" before 1972. The next sentence in the "gap-closing" section reinforces this interpretation. That sentence, which explains how to calculate the adjustment, refers to the benefit that the employee or survivor would be entitled to "if the disabling injury or death" had occurred after 1972. Id. The drafter of these

words seems to have assumed that post-1972 injuries and deaths would be compensated at the new, more generous rates (and, of course, they are, see §§ 6, 8, 9); but the drafter also seems to have assumed that workers whose disability resulted from a pre-1972 injury would be in need of a § 10(h)(1) adjustment (and, as we explained above, they are). Given the stronger need, rooted in the statute's purpose, to make the "gap-closing" sentence apply to the pre-1972 injury, post-1972 permanent total disability case, and given the difference in language that makes such an interpretation possible, we do not find the anomaly to which Bath points particularly serious. That is to say, it still makes sense to interpret the "gap-closing" sentence to mean what it seems to say in respect to post-1972 deaths,

despite a more generous reading of other language in the sentence in respect to post-1972 permanent total disabilities.

Third, Bath points to Director, OWCP v. Detroit Harbor Terminals, Inc., 850 F.2d 283 (6th Cir. 1988), aff'g Dennis v. Detroit Harbor Terminals, Inc., 18 B.R.B.S. 250 (1986), in which the Court of Appeals for the Sixth Circuit accepted the interpretation of the statute that Bath now urges upon us. For the reasons set forth above, however, we find the dissent's view in that case more convincing. See id. at 292-94 (Nelson, J., dissenting). We do not believe that the language and purpose of the 1972 statute permit the interpretation for which Bath argues. Rather, we conclude that Congress intended what the statute says and it wrote its language accordingly.

Because we hold that the Board erred by applying § 10(h)(1) to this case, we need not address the Director's additional contention that the Board miscalculated the benefits due under that section.

For the reasons given above, the determination of the Benefits Review Board is

Vacated and Remanded for further proceedings consistent with this opinion.

(Several minor typographical errors have been corrected in this transcription.)

Selected provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1982):

33 U.S.C. § 906. Compensation

(a) * * *

(b) (1) Except as provided in subsection (c) of this section, compensation for disability shall not exceed the following percentages of the applicable national average weekly wage as determined by the Secretary under paragraph (3):

(A) 125 per centum or $167, whichever is greater, during the period ending September 30, 1973.

(B) 150 per centum during the period beginning October 1, 1973, and ending September 30, 1974.

(C) 175 per centum during the period beginning October 1, 1974, and ending September 30, 1975.

(D) 200 per centum beginning October 1, 1975.

(2) Compensation for total disability shall not be less than 50 per centum of the applicable national average weekly wage determined by the Secretary under paragraph (3), except that if the employee's average weekly wages as computed under section 910 of this title are less than 50 per centum of such national average weekly wage, he shall receive his average weekly wages as compensation for total disability.

(3) As soon as practicable after June 30 of each year, and in any event prior to October 1 of such year, the Secretary shall determine the national average weekly wage for the three consecutive calendar quarters ending June 30. Such determination shall be the applicable national average weekly wage for the period beginning with October 1 of that year and ending with September 30 for the next year. The initial determination under this paragraph shall be made as soon as practicable after October 27, 1972.

* * * *

33 U.S.C. § 908. Compensation for disability.

Compensation for disability shall be paid to the employee as follows:

(a) Permanent total disability: In case of total disability adjudged to be permanent 66 2/3 per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability.

* * * *

33 U.S.C. § 909. Compensation for death.

If the injury causes death, or if the employee who sustains permanent total disability due to the injury thereafter dies from causes other than the injury, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

(a) Reasonable funeral expenses not exceeding $1,000.

(b) If there be a widow or widower and no child of the deceased, to such widow or widower 50 per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of 16 2/3 per centum of such wages for each such child; in the case of the death or remarriage of such widow or widower, if there be one surviving child of the deceased employee, such child shall have his compensation increased to 50 per centum of such wages, and if there be more than one surviving child for the deceased employee, to such children, in equal parts, to per centum of such wages increased by 16 2/3 per centum of such wages for each child in excess of one: Provided, That the total amount payable shall in no case exceed 66 2/3 per centum of such wages. * * *

* * * *

(e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not less than the applicable national average weekly wage as prescribed in section 906(b) of this title but the total weekly benefits shall not exceed the average weekly wages of the deceased.

* * * *

33 U.S.C. § 910. Determination of pay.

Except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:

(a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

* * * *

(d) The average weekly wages of an employee shall be one fifty-second part of his average annual earnings.

* * * *

(f) Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries sustained after October 27, 1972, shall be increased by a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October 1, as determined under section 906(b) of this title, exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1.

(g) The weekly compensation after adjustment under subsection (f) of this section shall be fixed at the nearest dollar. No adjustment of less than $1 shall be made, but in no event shall compensation or death benefits be reduced.

(h)(1) No later than ninety days after October 27, 1972, the compensation to which an employee or his survivor is entitled due to total permanent disability or death which commenced or occurred prior to October 27, 1972, shall be adjusted. The amount of such adjustment shall be determined in accordance with regulations of the Secretary by designating as the employee's average weekly wage the applicable national average weekly wage determined under section 906(b) of his title and (A) computing the compensation to which such employee or survivor would be entitled if the disabling injury or death had occurred on the day following October 27, 1972, and (B) subtracting therefrom the compensation to which such employee or survivor was entitled on October 27, 1972; except that no such employee or survivor shall receive total compensation amounting to less than that to which he was entitled on October 27, 1972. Notwithstanding the foregoing sentence, where such an employee or his survivor was awarded compensation as the result of death or permanent total disability at less than the maximum rate that was provided in this chapter at the time of the injury which resulted in the death or disability, then his average weekly wage shall be determined by increasing his average weekly wage at the time of such injury by the percentage which the applicable national average weekly wage has increased between the year in which the injury occurred and the first day of the first month following October 27, 1972. Where such injury occurred prior to 1947, the Secretary shall determine, on the basis of such economic data as he deems relevant, the

amount by which the employee's average weekly wage shall be increased for the pre-1947 period.

(2) Fifty per centum of any additional compensation or death benefit paid as a result of the adjustment required by paragraphs (1) and (3) of this subsection shall be paid out of the special fund established under section 944 of this title, and 50 per centum shall be paid from appropriations.

(3) For the purposes of subsections (f) and (g) of this section an injury which resulted in permanent total disability or death which occurred prior to October 27, 1972, shall be considered to have occurred on the day following such date.

Adm. Office, U.S. Courts - Blanchard Press. Inc., Boston, Mass.

APPENDIX B

BRB Decision

U.S. Department of Labor

Benefits Review Board
1111 20th St., N.W.
Washington, D.C. 20036

BRB No. 86-429

VELMA L. LEBEL,)
(Widow of EDWIN J. LEBEL)
)
Claimant-Respondent,)
)
v.)
)
BATH IRON WORKS)
CORPORATION,)
)
and)

COMMERCIAL UNION-	)	
COMPANIES,	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
	)	
DIRECTOR, OFFICE OF	)	
WORKERS' COMPENSATION	)	
PROGRAMS, UNITED STATES	)	
DEPARTMENT OF LABOR	)	
	)	
Respondent.	)	DECISION AND ORDER

Appeal of the Decision and Order and the Decision on Motion for Reconsideration of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Jeffrey L. Cohen (McTeague, Higbee, Libner, Reitman, MacAdam & Case). Brunswick, Maine, for claimant.

John H. King, Jr. (Norman & Hanson), Portland, Maine for employer/carrier.

Before: SMITH, Acting Chief Administrative Appeals Judge, and L. LAWRENCE, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Decision on Motion for Reconsideration (85-LHC-367) of Administrative Law Judge David W. Di Nardi rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C.

Section 901 et seq. (the Act). The administrative law judge's findings of fact and conclusions of law must be affirmed if they are supported by substantial evidence, are rational, and are in accordance with law. O'Keeffee v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965); 33 U.S.C. Section 921(b)(3).

In a 1975 Decision and Order, claimant's husband, the employee, was found to be permanently totally disabled by chronic obstructive pulmonary disease commencing September 10, 1971. 33 U.S.C. Section 908(a). He died on January 4, 1983, and his widow filed this claim for death benefits.

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. Section 921(b)(5)(Supp. IV 1986).

33 U.S.C. Section 909. In a 1985 Decision and Order, the administrative law judge determined that the employee's injury caused his death and that claimant and her dependent son were entitled to weekly death benefits totalling $173.58, to be paid by employer. Employer's motion for reconsideration was denied. On appeal, employer argues that it is liable for only $36.75 per week in death benefits. Claimant responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

Sections 10(h) and (3) of the Act, 33 U.S.C. Section 910(h)(1) and (3), upgrade the benefits payable for pre-1972 Amendment injuries beyond the pre-

amendment maximum, and Section 10(h)(2), 33 U.S.C. Section 910(h)(2), shifts liability for the increase from employer to the Special Fund and appropriations. Fox v. Pacific Ship Repair, 21 BRBS 171 (1988). The Board has held that Section 10(h) applies where a post-amendment death follows a pre-amendment injury. Id. at 173; Dennis v. Detroit Harbor Terminals, 18 BRBS 250, 252 (1986), aff'd sub nom. Director, OWCP v. Detroit Harbor Terminals, Inc., 850 F.2d 283, 21 BRBS 85 (CRT) (6th Cir. 1988). Employer does not challenge the entitlement of claimant and her son to benefits at the rate of $173.58 per week, contending instead that under Section 10(h)(2), the Special Fund and appropriations are liable for the difference between pre-1972 Amendment and post-1972 Amendment benefit levels. We agree.

Under Section 10(h)(1) compensation is calculated as if the employee's death occurred prior to the enactment of the 1972 Amendments, and this amount is subtracted from the compensation which claimant is entitled to receive under the 1972 Amendments. The Special Fund and appropriations are liable for the difference in compensation pursuant to Section 10(h)(2). The weekly compensation claimant would have been entitled to receive prior to enactment of the 1972 Amendments was $36.75[1] See Dennis, supra, 18 BRBS at 252-253. Thus, under the formula of Section 10(h), employer is liable for $36.75 per week

---

[1]Under Section 9(b) prior to passage of the 1972 Amendments, claimant would have been entitled to 35 percent of the employee's average weekly wage, subject to a maximum limit of $105.00 on the average weekly wage. 33 U.S.C. Section 909(b), (e) (1970). Since the employee's average weekly wage of $173.58 exceeded $105.00, claimant would have been entitled to 35 percent of $105.00, or $36.75.

and the Special Fund and appropriations are liable for $136.83.[2] We therefore vacate that part of the administrative law judge's order holding employer liable for all death benefits and modify the award according to the above formula.

Accordingly, the administrative law judge's order holding employer liable for all death benefits and modify the award according to the above formula.

Accordingly, the administrative law judge's Decision and Order is modified in accordance with this opinion.

---

[2]As the administrative law judge properly determined, the Special Fund and appropriations are also liable for the Section 10(f), 33 U.S.C. Section 910(f), adjustments to claimant's benefits. See Bingham v. General Dynamics Corp., 20 BRBS 198 (1988).

SO ORDERED.

ROY P. SMITH, Acting Chief
Administrative Appeals
Judge

JAMES F. BROWN
Administrative Appeals
Judge

LEONARD N. LAWRENCE
Administrative Law Judge

Dated this 30th

day of November, 1988

APPENDIX C

ALJ DECISION

Department of Labor

Office of Administrative
Law Judges
John W. McCormack
Post Office and Courthouse
Room 409
Boston, Massachusetts
02109

In the matter of:

Velma L. Lebel
(Widow of Edwin J. Lebel)

Claimant	Case No.
	85-LHC-367
against	OWCP No.

1-6854

Bath Iron Works Corporation

Employer

Commercial Union Insurance Cos.

American Mutual Insurance Co.

Carriers

and

Director, Office Workers'

Compensation Program

Party-in-Interest

Jeffrey L. Cohen, Esq.

For Claimant

John H. King, Esq.

For the Employer/Carrier

(No Appearance)

Director, Office Workers' Compensation Program

For the Party-in-Interest

Before: DAVID W. DI NARDI

Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for survivor's benefits under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. Section 901, et seq.), herein referred to as the "Act." The hearing was held on May 1, 1985 in Portland, Maine, at which time all parties were given the opportunity to present evidence

and oral arguments. Post-hearing briefs have been admitted into evidence as CX 17 and EX 10. The following references will be used: TR for transcript, CX for Claimant's exhibit and EX for Employer's exhibit. This decision is being rendered after having given full consideration to the entire record. Although invited to do so, the Director has not favored this tribunal with his opinion at this evidentiary stage (ALJ EX 5).

Stipulations

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Edwin J. Lebel (Decedent) and the Employer were in an employee-employer relationship at the relevant times.

3. On September 10, 1971, Decedent suffered an injury in the course and scope of his employment.

4. Decedent had tried his claim for compensation and was awarded benefits for total disability due to his occupational disease by Judge Thomas F. Howder on June 2, 1975.

5. Decedent died on January 4, 1983.

6. The parties attended an informal conference on March 29, 1984.

7. Claimant timely notified Employer of her husband's death and timely filed her claim within one year thereof.

ISSUES

The issues presented for resolution are:

1. Whether Employee's death was related to his work-related injury for which he was receiving permanent total disability benefits at the time of his death.

2. Whether Claimant is entitled to reimbursement of outstanding medical expenses relating to her husband's final hospitalization and treatment.

3. Whether Claimant is entitled to death benefits.

4. Whether Employee's stepson is entitled to benefits as a dependent.

5. Whether the Employer and/or the Special Fund are responsible for the Section 10(h) annual adjustments, and

6. Whether Claimant is entitled to penalties on any unpaid compensation.

SUMMARY OF THE EVIDENCE

Velma L. Lebel (Claimant) is the widow of Edwin J. Lebel [Employee or Decedent] and mother of Barry A. Barter. Edwin J. Lebel suffered an occupational injury on September 9, 1971 and was awarded permanent total disability benefits for that injury by Judge Thomas F. Howder by decision dated June 2, 1975, and through appeals to the Benefits Review Board and the First Circuit Court of Appeals. The Employee died on January 3, 1983 and Claimant incurred medical

expenses and funeral expenses resulting from Employee's hospitalization and interment services.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In arriving at a decision in this matter, the fact-finder is entitled to determine the credibility of the witnesses, to weight the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. Sargent v. Matson Terminal, Inc., 8 BRBS 564 (1978); Brandt v. Avondale Shipyards, Inc., 8 BRBS 698 (1978); Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 454 (1968), reh. denied, 391 U.S. 929 (1968); Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). At the outset it further must be recognized that all factual

doubts must be resolved in favor of the Claimant. Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968); Strachan Shipping Co. v. Shea, 406 F.2d 521 (5th Cir. 1969), cert. denied, 395 U.S. 921 (1970). Furthermore, it has consistently been held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 345 U.S. 328 (1953); J.B. Vozzolo, Inc. v. Pritton, 377 F.2d 144 (D.C. Cir. 1967). Based upon the humanitarian nature of the Act, the Act is to be interpreted liberally in favor of claimant, and claimants are to be accorded the benefit of doubts. Harrison v. Potomas Electric Power Company, 8 BRBS 313 (1978).

WIDOW'S BENEFITS

Since Employee's death occurred prior to September 28, 1984, the effective date of the 1984 Amendments relating to death benefits, the pre-1984 provisions of Section 9 of the Act apply to this case. Therefore, Claimant can recover Death Benefits if the Employee's compensable injury causes death, or if the employee was receiving permanent total disability benefits at the time of his death. Since the Employee was receiving permanent total disability benefits at the time of his death, Claimant does not have to prove causality between the immediate cause of death and the work-related injury. Claimant, however, has proven that a causal relationship exists between her husband's disability and his death. The Employee's compensable injury was chronic

obstructive pulmonary disease caused by his long occupational exposure to paint and other hazardous substances at Bath Iron Works (Employer). CX 1, 16. Dr. Elliott Sagall, a renowned cardiologist and internist, rendered a comprehensive medical report on December 3, 1973, which helped form the basis for Judge Howder's decision in 1975 (CX 16). In that report, Dr. Sagall found that in addition to his pulmonary problem, Employee also suffered from arteriosclerotic heart disease, which was not symptomatic at that time (Id.) Dr. Sagall went on to note a critical interrelationship between these two conditions:

> This cardia condition, in my opinion, stems from an etiology different from that of his lung disease and is not causally connected to his lung disorder. However, in view of the progressive nature of his chronic lung disease, it is likely that at some time in the not too distant future there will be a strain placed on his heart by reason of his lung

> disease, promoting the development of cor pulmonale. The combination of cor pulmonale plus the present cardiac disorder will result in congestive heart failure . . . [Id. at 4, emphasis supplied].

The death certificate (CX 14) reflects that the immediate cause of death was "cerebral infarction of brain stem" due to "arteriosclerotic vascular disease." The death certificate also shows that "congestive heart failure" contributed to Employee's death. Indeed, congestive heart failure is prominently included along with chronic obstructive lung disease, as diagnoses arrived at during Employee's final hospitalization immediately preceding his death (CX 15).

I therefore find Dr. Sagall in 1973 predicted exactly what happened in the Employee's medical course. His compensable injury accelerated the deterioration of his heart disease,

eventually leading to congestive heart failure which contributed to his death. Under these circumstances, and in light of Dr. Sagall's earlier opinion, this closed record establishes that the Employee's death was in fact causally related to his compensable injury. See, McCarthy Stevedoring Corp. v. Norton, 46 F.Supp. 26 (D.C. Pa., 1942) (injury which hastens death is considered to have "caused" the death for purposes of Section 9).

Furthermore, I also find that Claimant, Velma L. Lebel, is a widow within the meaning of Sections 9(b) and 2(16), as she was married to Employee, living with him and was wholly dependent on him for support (Tr. 15). Therefore, Claimant is entitled to Death Benefits under Section 9(b), measured at 50% of Employee's average weekly wage. Claimant

is also entitled to $399.00 in reasonable funeral expenses (See CX 6; Section 9(a)).

Surviving Child

An additional amount of 16 2/3 per centum of the wages of the deceased Employee are paid as Death Benefits if there is a surviving child. See Section 9(b). A child is defined in the Act as including a "stepchild", and a child in relation to whom the deceased Employee stood in loco parentis for at least one year prior to the time of injury. The term "child" also includes a person who is over eighteen years old and who is totally dependent upon the Employee and incapable of self-support by reason of mental disability. Section 2(14) of the Act; Doe v. Jarka Corp., 16 BRBS 318 (1984).

Barry Barter, Employee's stepchild, resided with Claimant and Employee, and is currently 42 years old and has been mentally retarded since age four. CX 11. The stepchild is incapable of caring for his own needs. Tr. 16. The question of dependency is to be determined as of the time of injury. Section 9(f); Ryan-Walsh Stevedoring Co. v. Trainer, 601 F.2d 1306 (5th Cir. 1979).

Until September 10, 1971, Employee was working full-time at Employer's shipyard and supporting his family. Claimant was not working. Tr. 15. There is no suggestion in the record that at the time of injury, September 10, 1971, Mr. Barter, had any means of support other than Employee's salary. Although Employee's stepchild later began

receiving social security payments in September of 1971. See, Ryan-Walsh Stevedoring Co. v. Trainer, supra.

The evidence, therefore, shows that Barry Barter was in fact wholly dependent on Employee for support on September 10, 1971. It should also be noted that the courts have consistently liberally construed the definition of "child" in Section 2(14 of the Act so as to provide coverage in similar situations, in keeping with the liberal spirit of the Act. See Texas Employer's Insurance Association v. Shea, 410 F.2d 56 (5th Cir. 1969). This construction, coupled with the Section 20 presumption that the claim on behalf of Employee's stepchild comes within the provisions of the Act, compels the conclusion that Mr. Barter is indeed a dependent child entitled to benefits under Section 9(b).

Level of Death Benefits and Annual Adjustments

The level of compensation for death benefits is based upon the Employee's average weekly wage at the time of injury. Section 10. Employee's time of injury due to his occupational disease is the date on which the Employee knew or should have known of the relationship between his employment, the disease, and the death or disability. Littrell v. Oregon Shipbuilding Company, 17 BRBS 84, 86 (1985); Pitts v. Bethlehem Steel Corp., 17 BRBS 17 (1985). Based on Judge Howder's Decision and Order I find the date the Employee knew of his disability, his disease and its relationship to his employment to be September 10, 1971. Claimant's Death Benefits, therefore, are based on this date to determine her rate of benefits. The provisions of the 1984

Amendments with regard to computation of Claimant's Death Benefits are inapplicable since the Employee's death was prior to September 28, 1984. Therefore, applying the pre-1984 amendment Section 9 provisions, Claimant is entitled to 50% of the Employee's average weekly wages and the stepson to 16 2/3 per centum of that amount. I find the pre-1984 and post-1972 amended act to be applicable.

Since the Employee died on January 4, 1983, Claimant is entitled to " . . . not less than the applicable national average weekly wages as prescribed in Section 6(b) but the total weekly benefits shall not exceed the average weekly wages of the deceased." Section 9(e). At the time of Employee's death the national average weekly wage was $262.35. The Benefits Review Board has

consistently held that for purposes of construing Section 9(e) of the Act, the national average weekly wage referred to therein is the national average weekly wage applicable at the time of the Employee's death, rather than at the time of the Employee's injury. See, e.g., Lombardo v. Moore-McCormack Lines, Inc., 6 BRBS 361 (1977); Dunn v. Equitable Equipment Company, 8 BRBS 18 (1978).

However, at the time of injury the Employee's average weekly wage was $173.58 and, therefore, the total benefits cannot exceed this amount. Therefore, Claimant and Decedent's stepson will share the total weekly benefit of $173.58 in the same proportion as 50% to 16 2/3%, or Claimant shall receive $130.18 and the stepson, $43.40.

These Death Benefits are also subject to the annual adjustments provision of Section 10(f). Section 10(f) expressly states that it affects only those "benefits payable for permanent total disability or death arising out of an injury sustained after the date of enactment of this subsection, "i.e., October 27, 1972.

The amendments to Section 10(f) provide for an adjustment in benefits to Employees who had become permanently and totally disabled prior to November 26, 1972. The statutory scheme, however, distinguished between those Employees who had become permanently and totally disabled after the date of enactment, (See, Ness v. Todd Shipyard Corporation, 10 BRBS 726, 727 (1978).

The rationale for that distinction is clear. Congress intended by the 1972 amendments to increase benefits for Employees, but did not intend to increase the liability of Employers whose obligations had been established prior to the effective date of the 1972 amendments. In so doing Congress provided two methods of payment. In those cases in which an injury occurred after the effective date of the amendments, an Employer's liability would be increased. In those cases in which the injury occurred before the enactment of the amendments, Congress provided for increased benefit levels to Employees or their survivors but also provided, through Section 10(h), that the adjustments in compensation would be paid by the Special Fund.

This Court, in Cain v. Bath Iron Works, Case No. 83-LHC-1853, OWCP No. 1-00593 (February 13, 1984), a case in which an Employee was injured and became permanently totally disabled prior to the 1972 amendments but who died after the 1972 amendments, held that the annual adjustments are payable in accordance with the provisions of Section 10(h)(2) by the Special Fund and by general appropriations. In so doing this Administrative Law Judge noted "[t]here is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes", citing United States v. American Trucking Associations, 310 US 534 (1940). The clear language of the Act requires that adjustments in compensations for

permanent total disability or benefits be paid by the Special Fund and general appropriations.

The legislative history behind the amendments also supports that conclusion.

Q. How will the initial adjustments for persons injured prior to the enactment of the amendments be financed?

A. benefits for post-enactment injuries can be covered by insurance, but insurance cannot be retroactive.,

The "special fund" now provided for in the Act serves primarily as a second injury fund. The fund is now financed by death benefit payments where there are no survivors and by fines and penalties leveled under the Act. The proposed amendments would strengthen the financing of the fund by providing for assessments against carriers and self-insured employers. The amendments provide that 50 percent of the cost of the initial annual adjustments made in the benefits of persons injured prior to enactment of the bill will be paid from the "special injury fund."

118 Cong. Rec. 36386 (1972) (Remarks of Rep. Steiger).

The Benefits Review Board in Silberstein v. Service Printing Company, 2 BRBS 143 (1975), addressed an analogous issue in a case in which a Claimant was injured before the 1972 amendments but became permanently and totally disabled after the effective date of the 1972 Amendments. The issue in Silberstein was whether the adjustments to the Claimant's compensation were to be paid out of the fund rather than by the Employer. The Board held that Section 10(h)(3) controlled the matter and that payments for the annual increases were to be made by the Special Fund and appropriations. Silberstein was followed by the Board in death benefit cases in Alford v. Lea Siegler, Inc., 4 BRBS 217 91976). In that case the Employee's death in 1974

was related to an injury sustained in the course of his employment in 1969. Likewise, the Board in Hernandez v. Base Billeting Fund, 13 BRBS 214 (1980), modified on reconsideration, 13 BRBS 220 (1981) clearly held on reconsideration of its initial decision "we reiterate for purposes of clarification that Section 10(h)(1) provides for an initial adjustment to upgrade benefits for permanent total disability or death resulting from pre-amendment injuries . . . " 13 BRBS at 221.

The clear language of the statute requires payment pursuant to Section 10(h). The case law on this issue requires payments by the Special Fund pursuant to Section 10(h). The two most recent cases of the Benefits Review Board, Littrell v. Oregon Shipbuilding Co., 17 BRBS 84 (1985) and Pitts v.

Bethlehem Steel Corp., 17 BRBS 17 (1985), clearly support this conclusion. In Pitts, the Claimant's date of manifestation was found to be May 29, 1980, a date after the 1972 amendments. Therefore, in Pitts Section 10(h) adjustments were denied by the Board. In Littrell, however, the Claimant's date of manifestation, i.e., injury, was not found by the Administrative Law Judge, although Claimant died on June 14, 1979. The Board in Littrell remanded the case for a determination of the date of manifestation, pointing out that Section 10(h) might still apply for a pre-1972 injury date, and directed attention to Section 10(i) of the 1984 amendments. Case law, therefore, holds that as long as the injury is prior to the 1972 amendment date and the injury subsequently becomes totally disabling after 1972, the provisions of Section

10(h) are applicable. In the case at bar, the Employee's date of manifestation was September 10, 1971, a date prior to the 1972 amendments. Thus, under Silberstein v. Service Printing, supra; Littrell v. Oregon Shipbuilding, supra; and Pitts v. Bethlehem Steel, supra, Section 10(h) is applicable in this case.

In addition, the unique facts of this case also require that the annual adjustments be made pursuant to Section 10(h). In 1975 Judge Howder ordered payment of adjustments, pursuant to Section 10(h), by the Special Fund (EX. 4). That decision was appealed to the Benefits Review Board which issued its decision on February 9, 1976 (EX. 5). The documents before this Court indicate that the Special Fund participated in that appeal. In that appeal The Benefits Review Board held that

"the purpose of Section 10(h) is to provide initial and annual adjustments in those cases where a pre-amendment injury results in permanent total disability or death. Where, as here, Claimant was found to be permanently totally disabled as a result of a work-related injury occurring before November 26, 1972, compensation is paid at the pre-amendment maximum of $70.00 per week until the effective date of the Amendment, at which time the benefits are adjusted in accordance with the formula set forth in Section 10(h)(1) of the Act. Thereafter, Claimant is entitled to an annual increase in his compensation rate: pursuant to Section 10(h)(3) with the Act. See Silberstein v. Service Printing Company, Inc., 2 BRBS 143 (1975). Fifty percent of any additional compensation due Claimant under Sections 10(h)(1) and 10(h)(3) is paid out of the Special Fund and 50 percent is paid out of appropriations. 33 USC Section 910(h)(2).

The decision rendered by the Benefits Review Board was appealed to the First Circuit Court of Appeals. EX. 7. The Office of the Solicitor participated in the appeal. Not only does the clear

language of the statute, the legislative history and case law impose liability in the Special Fund, pursuant to Section 10(h), but even though a case for Death Benefits is a separate claim, the liability for adjustments has been established as the law of the case and the principle of collateral estoppel therefore requires that the Special Fund continue to pay the annual adjustments mandated herein.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. Perez v. Sea-land Services, Inc., 8 BRBS 130 (1978). Entitlement to medical services is never

time-barred where a disability is related to a compensable injury. Dean v. Marine Terminals Corp., 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. Bulone v. Universal Terminal and Stevedore Corp., 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for her husband's work-related injury. Gilliam v. The Western Union Telegraph Co., 8 BRBS 278 (1978).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), Claimant may not recover medical costs

incurred. Betz v. Arthur Snowden Company, 14 BRBS 805 (1981). See also 20 C.F.R. Section 702.422.

The Employee was admitted to the Community Hospital of Chula Vista for emergency treatment on December 21, 1982. The Employee's condition was diagnosed as 1) probable brain stem infarction; 2) congestive heart failure, 3) advanced chronic obstructive pulmonary disease and 4) history of previous transient ischemic attack. After several weeks in intensive care the Employee expired on January 3, 1983 (CX 15). Employer was notified of Employee's death. I, therefore, find and conclude that in consideration of the fact that the Employee required emergency treatment and timely notice was given to the Employer of the Employee's subsequent death, the provisions of Section 7 of the Act have been complied with and

Respondents are responsible for those reasonable and necessary medical expenses incurred as a result of the Employee's work-related injury.

Attorney's fee

Claimant's attorney having successfully prosecuted this claim, is entitled to a fee to be assessed against Respondents. Claimant's attorney has not submitted his fee application. Within fourteen days of the receipt of this Decision and Order, he shall submit a fully supported and fully itemized fee application, sending a copy thereof to the Employer's counsel who shall then have fourteen days to comment thereon. The postmark shall determine the timeliness of any filing. This Court will consider only those legal services rendered after the date of the informal

conference on March 29, 1984. Services performed prior to that date should be submitted to the Deputy Commissioner for his consideration.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I make the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the Deputy Commissioner

It is therefore ORDERED that:

1) Respondents, Bath Iron Works and Commercial Union Insurance Companies, shall pay Claimant Death Benefits at the rate of $130.18 and Decedent's dependent stepson $43.40 per week as Death Benefits in accordance with Section 9(b) of the Act commencing on January 4, 1983.

2) Respondents shall pay Claimant $399.00 in accordance with Section 9(a) of the Act.

3) Respondents shall pay the outstanding medical expenses herein, including those relating to the Employee's final hospitalization, subject to the provisions of Section 7 of the Act.

4) Interest shall be paid on all accrued benefits of the appropriate T-bill rate applicable under 28 U.S.C. Section 1961 (1982), computed from the date each payment was originally due until paid, and the rate to be determined as of the filing date of this Decision and Order with the Deputy Commissioner.

5) The Special Fund shall pay to Claimant all of the adjustments due, pursuant to the provisions of Sections 10(h)(1) and 10(h)(3) of the 1972 Act, in connection with Decedent's work-related pulmonary disease and his death related there from on January 3, 1983.

6) Claimant's Attorney shall file with this Court, within fourteen days of receipt of this Decision and Order, a fully itemized fee petition serving a copy thereof on Respondents' attorney who shall have fourteen days to comment thereon.

DAVID W. DI NARDI

Administrative Law Judge

Dated:

Boston, Massachusetts

APPENDIX D

Selected Portions LHWCA

33 U.S.C. § 909. Compensation for Death.

If the injury causes death or if the employee who sustains permanent total disability due to the injury thereafter dies from causes other than the injury, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

(a) Reasonable funeral expenses no exceeding $1,000.

(b) If there be a widow or widower and no child of the deceased to such widow or widower 50 per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of surviving child or children of the deceased, the additional amount of 16 2/3 per centum of such wages for each child; in the case of the death or remarriage of such widow or widower, if there be one surviving child of the deceased employee, such child shall have his compensation increased to 50 per centum of such wages and if there be more than one surviving child of the deceased employee, to such children, in equal parts, 50 per centum of such wages increased by 16 2/3 per centum of such wages for each child in excess of one: Provided, That the total amount payable shall in no case exceed 66/23 per centum of such wages. The deputy commissioner having jurisdiction over the claim may, in his discretion, require the appointment of a guardian for the purpose

of receiving the compensation of a minor child. In the absence of such a requirement the appointment of a guardian for such purposes shall not be necessary.

(c) If there be one surviving child of the deceased, but no widow or widower, then for the support of such child 50 per centum of the wages of the deceased; and if there be more than one surviving child of the deceased, but no widow or dependent husband, then for the support of such children, in equal parts 50 per centum of such wages increased by 16 2/3 per centum of such wages for each child in excess of one: Provided. That the total amount payable shall in no case exceed 66/23 per centum of such wages.

(d) If there be no surviving wife or husband or child, or if the amount payable to a surviving wife or husband and to children shall ne less in the aggregate than 66 2/3 per centum of the average wages of the deceased; then for the support of grandchildren or brothers and sisters, if dependent upon the deceased at the time of the injury and any other persons who satisfy the definition of the term "dependent" in section 152 of title 26 of the United States Code, but are not otherwise eligible under this section, 20 per centum of such wages for the support of each such person during such dependency and for the support of each parent, or grandparent, of the deceased if dependent upon him at the time of the injury, 25 per centum of such wages during such dependency. But in no case shall the aggregate amount payable under this subdivision exceed the difference between 66 2/3 per centum of such wages and the amount payable as hereinbefore provided to widow or widower and for the support of surviving child or children.

(e) In computing death benefits the average weekly wages of the deceased shall be considered to have been no less than the applicable national average weekly wage as prescribed in section 6(b) but the total weekly benefits shall no exceed the average weekly wages of the deceased.

(f) All questions of dependency shall be determined as for the time of the injury.

(g) Aliens: Compensation under this chapter to aliens not residents (or about to become nonresidents) of the United States or Canada shall ne the same in amount as provided for residents, except that dependents in any foreign country shall be limited to surviving wife and child or children, or if there be no surviving wife or child or children, to surviving father or mother whom the employee has supported, either wholly or in part, for the period of one year prior to the date of the injury, and except that the Secretary may, at his option or upon the application of the insurance carrier shall, commute all future installments of compensation to be paid to such aliens by paying or causing to be paid to them one-half of the commuted amount of such future installments of compensation as determined by the Secretary.

33 U.S.C. § 910. Determination of Pay

Except as otherwise provided in this Act, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:

(a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer,

during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

(b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earning if a six-day workers, shall consist of three hundred times the average daily wage or salary and if a five-day workers, two hundred and sixty times the average daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

(c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings hall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

(d) The average weekly wages of an employee shall be one fifty-second part of his average annual earnings.

(e) If it be established that the injured employee was a minor when injured and that under normal conditions his wages should be expected to increase during the period of disability the fact may be considered in arriving at his average weekly wages.

(f) Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries sustained after the date of enactment of this subsection shall be increased by a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October 1, as determined under section 6(b), exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1.

(g) The weekly compensation after adjustment under subsection (f) shall be fixed at the nearest dollar. No adjustment of less than $1 shall be made, but in no event shall compensation for death benefits be reduced.

(h)(1) Not later than ninety days after the date of enactment of this subsection, the compensation to which an employee or his survivor is entitled due to total permanent disability or death which commenced or occurred prior to enactment of this subsection shall be adjusted. The amount of such adjustment shall be determined in accordance with regulations of the Secretary by designating as the employee's average weekly wage the applicable national average weekly wage determined under section 6(b) and (A) computing the compensation to which such employee or

survivor would be entitled if the disabling injury or death had occurred on the day following such enactment date and (B) subtracting therefrom the compensation to which such employee or survivor was entitled on such enactment date; except that no such employee or survivor shall receive total compensation amounting to less than that to which he was entitled on such enactment date. Notwithstanding the foregoing sentence, where such an employee or his survivor was awarded compensation as the result of death or permanent total disability at less than the maximum rate that was provided in this Act at the time of the injury which resulted in the death or disability, then his average weekly wage shall be determined by increasing his average weekly wage at the time of such injury by the percentage which the applicable national average weekly wage has increased between the year in which the injury occurred and the first day of the first month following the enactment of this section. Where such injury occurred prior to 1947, the Secretary shall determine on the basis of such economic data as he deems relevant, the amount by which the employee's average weekly wage shall be increased for the pre-1947 period.

(2) Fifty per centum of any additional compensation or death benefit paid as a result of the adjustment required by paragraphs (1) and (3) of this subsection shall be paid out of the special fund established under section 44 of this Act, and 50 per centum shall be paid from appropriations.

(3) For the purposes of subsections (f) and (g) an injury which resulted in permanent total disability or death which occurred prior to the date of enactment

of this subsection shall be considered to have occurred on the day following such enactment date.

33 U.S.C. § 944. Special Fund.

(a) There is hereby established in the Treasury of the United States a special fund. Such fund shall be administered by the Secretary. The Treasurer of the United States shall be the custodian of such fund, and all moneys and securities in such fund shall be held in trust by such Treasurer and shall not be money or property for the United States.

(b) The Treasurer is authorized to disburse moneys from such fund only upon order the Secretary. He shall be required to give bond in an amount to be fixed and with securities to be approved by the Secretary of the Treasury and the Comptroller General of the United States conditioned upon the faithful performance of his duty as custodian of such fund.

(c) Payments into such fund shall be made as follows:

(1) Whenever the Secretary determines that there is no person entitled under this Act to compensation for the death of an employee which would otherwise be compensable under this Act, the appropriate employer shall pay $5,000 as compensation for the death of such an employee.

(2) At the beginning of each calendar year the Secretary shall estimate the probably expenses of the fund during that calendar years and each carrier of self-insurer shall make payments into the fund on a prorated assessment by the Secretary in the proportion that the total compensation and medical payments made on risks covered by this Act by each carrier and self-insurers bears to the total of such payments made by all carriers and

self-insurers under the Act in the prior calendar year in accordance with a formula and schedule to be determined from time to time by the Secretary to maintain adequate reserves in the fund.

(3) All amounts collected as fines and penalties under the provisions of this Act shall be paid into such fund.

(d)(1) For the purpose of making rules, regulations, and determinations under this section and for providing enforcement thereof, the Secretary may investigate and gather appropriate data from each carrier and self-insurer. For that purpose, the Secretary may enter and inspect such places and records (and make such transcriptions thereof), question such employees and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate.

(2) Each carrier and self-insurer shall make, keep, and preserve such records, and make such reports and provide such additional information, as prescribed by regulation or order of the Secretary, as the Secretary deems necessary or appropriate to carry out his responsibilities under this section.

(3) For the purpose of any hearing or investigation related to determinations or the enforcement of the provisions of this section, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U.S.C., title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Secretary of Labor.

(e) There is hereby authorized to be appropriated to the Secretary the sum of $2,000,000 which the Secretary shall immediately deposit into the fund. Upon deposit in the fund such moneys shall be

treated as the property of such fund. This sum, without additional payments for interest, shall be repaid from the money or property belonging to the fund on a schedule of repayment set by the Secretary: Provided, That full repayment must be made no later than five years from the date of deposit into the fund. Each such repayment, as made, shall be covered into the Treasury of the United States as miscellaneous receipts.

(f) The Treasurer of the United States shall deposit any moneys paid into such fund into such depository banks as the Secretary may designate and may invest any portion of the funds which, in the opinion of the Secretary, is not needed for current requirements, in bonds or notes of the United States or any Federal land bank.

(g) Neither the United States nor the Secretary shall be liable in respect of payments authorized under section 8 in an amount greater than the money or property deposited in or belonging to such fund.

(h) The Comptroller General of the United States shall audit the account for such fund, but the action of the Secretary in making payments from such fund shall be final and not subject to review, and the Comptroller General is authorized and directed to allow credit in the accounts of any disbursing officer of the Secretary for payments made from such fund authorized by the Secretary.

(i) All civil penalties provided for in this Act shall be collected by civil suit brought by the Secretary.

(j) The proceeds of this fund shall be available for payments:

(1) Pursuant to section 10 and 11 with respect to initial and subsequent annual adjustments in compensation for

total permanent disability or death which occurred prior to the effective date of this subsection.

(2) Under section 8(f) and (g), under section 18(b), and under section 39(c).

(3) To repay the sums deposited in the fund pursuant to subsection (d).

(4) To defray the expense of making examinations as provided in section 7.

(k) At the close of each fiscal year the Secretary shall submit to the Congress a complete audit of the fund.

APPENDIX E

Legislative History

Remarks of Hon. James D. Hodgson, Secretary to labor to the Subcommittee on Labor of the Committee on Labor and *Public Welfare. Tuesday, May 2, 1972.* Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 92.d Cong., 2d Sess. 32 (1972).

> S. 2318 would also require annual adjustment of the rates of compensation based on the percentage increase in average weekly wages in the longshore industry.
>
> This adjustment could be applicable to all the other industries and all types of employees covered by the Longshore Act-for example, all private employees in the District of Columbia.
>
> I think the idea of annual adjustment of compensation rates is an interesting one and deserves careful consideration. The committee should consider, for example, whether there is a need to establish a special fund to compensate insurers for increased benefit payments.

Since future benefit levels are unknown, in a system of annual adjustments insurers would have difficulty setting premium rates. Payment of higher benefits out of lower premiums set before adjustments in benefits levels could undermine the actuarial soundness of the compensation plan.

If there were automatic annual adjustments in the level of compensation, however, there might be less impetus for Congress to review the act periodically. We think such review is necessary and desirable.

Anyone who has made an effort to understand this field will agree that it is a complex and difficult one with evolving problems. Over time, important issues arise that deserve your attention.

In addition to these nondollar issues, every increase in benefit levels has a direct impact not only on employees but on employers as well, in the form of higher insurance premiums.

We note that Congress has traditionally wished to consider very carefully what is the most equitable adjustment in benefits, taking into account the needs of injured workers, the economic situation of employers, and the potential effects on the U.S. Maritime Industry.

Mr. Chairman, we urge this committee to give prompt consideration to the administration bill. In particular we recommend the inclusion in any reported bill of the provisions in S. 525 on raising the level of benefits and eliminating circular liability suits.

Remarks of Ralph Hartman, Assistant Manager, Safety and Workmen's Compensation Division, Industrial Relations Department, Bethlehem Steel Corp., Wednesday, May 17, 1972, LHWCA Amendments of 1972, 92.d Cong. 2d Sess. 172-3 (1972)

A new subsection to section 10 would provide that the Secretary of Labor shall, as of June 30 each year, determine the per centum change in weekly wage level in the longshore industry during the preceding year; and that, effective on the first day of the third month thereafter, compensation payable on account of disability or death "which occurred more than 1 year before that first day, and which occurred after enactment

of this subsection shall be increased by the per centum rise in the wage level".

This establishes an annual benefit adjustment in cases originating on and after the effective date of the amendment and would be based on "longshoring" wage changes. The "longshoring" average weekly wage is reported to be substantially higher and with more frequent changes than in shipbuilding and ship repair yards-again I stress the fairness of a separate wage factor for our industry. The escalation theory cannot be opposed. The industry does not do so; rather, we endorse it. As proposed, this will provide an annual updating of current claims. But what of old claims, and specifically permanent total and death cases originating prior to the effective date of the proposed amendment? Should those employees of the industry who are permanently totally disabled and the widows of employees killed in the course of their employment and on the rolls as of such effective date not have their benefits brought up to the benefit level which was established as of July 14, 1961? In this regard, we suggest an approach similar to section 25a(9)(a-g) of the New York State Workmen's Compensation Law, which provides for an effective means of updating benefit levels of old permanent total and death

cases through a special fund. This fund can be financed through general revenue funds or, as in New York, by assessments on the shipbuilding and ship repair industry through their insurance carriers or directly in the case of self-insured employer.

The proposed method of financing the special fund under section 44(c)(2) is particularly objectionable. Payments into the fund of the balance of the schedule award where there are no qualifying dependents smacks more of a penalty than benefits as does the increase in the assessment in nondependency death cases.

The method of financing the fund by prorated assessments based on the gross premiums collected by carriers or the amount of premiums a self-insurer would have had to pay for commercial insurance is totally inequitable, particularly for self-insurers.

It is suggested that a more equitable and acceptable method of financing the special fund is a prorated assessment on each carrier and self-insurer in the proportion that the total compensation payments made on risks covered by the act by each carrier and self-insurer bear to the total payments made by all carriers and self-insurers under the act in the prior calendar year.

So that the employer who has substantial losses, in effect does not have an

effective safety program, he is going to pay a greater proportion than those who have a better accident experience.

No. 89-1156

Supreme Court, U.S.
FILED
MAR 20 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

BATH IRON WORKS CORPORATION, ET AL., PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Section 10(h)(1) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 910(h)(1), adjusts benefits payable for "total permanent disability or death which commenced or occurred prior to October 27, 1972," and Section 10(h)(2), 33 U.S.C. 910(h)(2), provides for a particular source of payments of those adjusted benefits. The question presented is whether Section 10(h)(1) and (2) applies to a claim for death benefits based on a death that occurred after October 27, 1972, due in part to an injury that resulted in total permanent disability before that date.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1156

BATH IRON WORKS CORPORATION, ET AL., PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A53) is reported at 885 F.2d 983. The decision of the Benefits Review Board (Pet. App. B1-B11) and the decision of the administrative law judge (Pet. App. C1-C36) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1989, and the petition for a writ of certiorari was filed on December 19, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are an employer subject to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, and its insurer. Pet. App. C4. The Act provides compensation to covered workers or their survivors for work-related injuries that result in disability or death. See 33 U.S.C. 908, 909 (1982 & Supp. V 1987).

Before 1972, the Act fixed the weekly disability benefits due a permanently and totally disabled worker at 66⅔% of his or her average weekly wage, subject to a maximum benefit rate of $70 per week. 33 U.S.C. 906(b), 908(a) (1970); Pet. App. A11. The statute also fixed the weekly death benefits due the surviving spouse and child of an injured worker at 50% of the worker's average weekly wage, subject to a $52.50 per week maximum. 33 U.S.C. 909(b) and (e) (1970); Pet. App. A11. Because the law allowed no cost of living adjustment (COLA), inflation eroded the value of these weekly payments.

In a law enacted on October 27, 1972, Congress amended the Act to increase the maximum benefits for permanently and totally disabled workers from $70 per week to an amount tied to the "national average weekly wage," a figure the Secretary of Labor determines each year. Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, § 5(a), 86 Stat. 1252-1253 (codified at 33 U.S.C. 906(b) and (d)). See Pet. App. A12. Congress also increased death benefits from 50% to 66⅔% of a worker's "average weekly wage" for a spouse with a child and provided that this wage should not be considered to be less than the "applicable national average weekly wage" (except that the total weekly benefits could not exceed the deceased

worker's actual weekly earnings). Pub. L. No. 92-576, §§ 10(b) and (d), 20(c)(2), 86 Stat. 1257, 1258, 1265 (codified at 33 U.S.C. 909(b), (c) and (e)) (1982 & Supp. V 1987)). See Pet. App. A13.[1] To ensure that awards kept pace with inflation, Congress provided an automatic COLA[2] for both permanent total disability and death benefits. Pub. L. No. 92-576, § 11, 86 Stat. 1258 (codified at 33 U.S.C. 910(f) (1982 & Supp. V 1987)). See Pet. App. A14.

Congress applied these more generous benefit and COLA provisions to pre-1972 disabilities and deaths by enacting Section 10(h) of the statute, 33 U.S.C. 910(h). See Pub. L. No. 92-576, § 11, 86 Stat. 1258-1259; Pet. App. A14-A15. In Section 10(h)(1), it adjusted the benefits "to which an employee or his survivor is entitled due to total permanent disability or death which commenced or occurred prior to October 27, 1972 [the date of enactment of the 1972 amendments]," by giving such claimants an initial adjustment equal to the difference between the amount to which they "would be entitled if the disabling injury or death had occurred on the day following such enactment date" and the amount to which they were entitled before then. 33 U.S.C. 910(h)(1)(A) and (B). This one-time adjustment was required "[n]ot later than ninety days after the date of enactment." 33 U.S.C. 910(h)(1).

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[1] In 1972 Congress also made death benefits available to survivors of a totally disabled worker who died from causes other than the work-related injury that gave rise to the disability. Pub. L. No. 92-576, § 5(d), 86 Stat. 1253-1254. Congress repealed this provision in 1984. Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 9, 98 Stat. 1647.

[2] We employ the "cost of living" terminology because it was employed by the court of appeals. The increase in fact represents an annual increase in a certain national wage rate.

In Section 10(h)(3), Congress provided that the COLA, which by its own terms applied only to injuries sustained after the 1972 amendments were enacted (see 33 U.S.C. 910(f)), would also apply to pre-1972 injuries "which resulted in permanent total disability or death." Congress did so by considering such injuries "to have occurred on the day following such [enactment] date." 33 U.S.C. 910(h)(3). Although in general, benefits under the Act are payable by the employer (or his insurer), Section 10(h)(2), 33 U.S.C. 910(h)(2), provides that the COLA for pre-1972 injuries (under Section 10(h)(3)) and the adjustment for pre-1972 disabilities and deaths (under Section 10(h)(1)) are to be paid in equal shares out of federal appropriations and a Special Fund.[3]

2. In 1971, Edwin Lebel, an employee of petitioner Bath Iron Works, suffered a totally disabling work-related injury. Pet. App. A3, C7. His average weekly wage at the time of injury was $173.58 (Pet. App. C19), but the pre-1972 law allowed him to receive payments of only $70 a week rather than $115.60 (66⅔% of his average weekly wage). Pursuant to the 1972 amendments, he received both a Section 10(h)(1) adjustment and a COLA under Section 10(h)(3). *Lebel* v. *Bath Iron Works Corp.*, 3 Ben. Rev. Bd. Serv. (MB) 216 (Ben. Rev. Bd.), aff'd on other grounds, 544 F.2d 1112 (1st Cir. 1976). Government appropriations and the Special Fund

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[3] The Special Fund is a Treasury account that employers finance and the Department of Labor administers. 33 U.S.C. 944 (1982 & Supp. V 1987). Among other responsibilities, the Fund pays benefits in certain instances where a previously injured employee sustains a second injury or an employer or insurer is insolvent. 33 U.S.C. 944(i) (1982 & Supp. V 1987).

each paid 50% of these adjustments. 3 Ben. Rev. Bd. Serv. (MB) at 219.

Edwin Lebel died in January 1983; his surviving spouse, Velma Lebel, subsequently applied for death benefits on behalf of herself and Mr. Lebel's stepson. Pet. App. A6, C5, C15. An administrative law judge determined that Mr. Lebel's injury had contributed to his death and that death benefits were due to his survivors under Section 9 of the statute as it existed in 1983. Pet. App. C1-C36.[4] Pet. App. C10-C13. Since that Section applies in cases of death occurring after enactment of the 1972 amendments, Mrs. Lebel and the stepson received the larger, post-1972 benefits rather than the smaller amounts available under the pre-1972 law. Pet. App. C18-C19.[5] Without specifying the amounts, the ALJ also determined that the Special Fund had to pay both the adjustments due under Section 10(h)(3) (annual COLAs) and Section 10(h)(1) (assumedly, the difference in pre- and post-1972 death benefits).[6] Pet. App. C20-C29, C35.

The Benefits Review Board modified the ALJ's award to require the Special Fund and government

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[4] The ALJ's decision, undated in petitioners' appendix, was issued on November 5, 1985.

[5] As discussed above, the 1972 amendments provided for compensation equal to 66⅔% of the deceased worker's average weekly wage, provided that this wage was not less than the applicable 1983 national average wage except that the maximum benefit could not exceed the worker's actual average weekly wage. Applying this formula, the ALJ awarded weekly benefits of $173.58, the amount of Lebel's average weekly wage. Pet. App. C18-C19.

[6] As explained above, the Special Fund would in fact pay only 50% of payments ordered under Section 10(h); government appropriations would pay the remaining 50%.

appropriations to pay in equal shares all but $36.75 of the $173.58 per week that the ALJ had awarded.[7] Pet. App. B1-B9. The Board reached this result by applying Section 10(h)(1)(A)-(B), under which government appropriations and the Special Fund pay the difference between the benefits to which a survivor "would be entitled" if an injured worker had died on the day following enactment of the 1972 amendments and the benefits to which the survivor "was entitled" on the enactment date. The Board did not explain why application of this Section was necessary for a survivor who had been entitled to no benefits until Mr. Læbel's death in January 1983 and whose benefits at that time were determined under another Section of the Act (Section 9).

3. On the Director's petition for review, the court of appeals vacated the Board's decision and remanded for further proceedings. Pet. App. A1-A47. It determined that the Board had erred in applying the provisions of Section 10(h)(1) to the weekly death benefits and in holding that the government and the Fund, rather than the employer (or its insurer) were obligated to pay $136.83 of those benefits. After thorough analysis of the 1972 amendments (Pet. App. A9-A19), the court concluded that Section 10(h)(1) did not apply because that Section adjusts compensation "due to total permanent disability or death which commenced or occurred prior to October 27, 1972," and thus clearly excludes Mrs. Læbel's claim for a death that occurred in 1983 (Pet. App. A21-A24).

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[7] The Board also affirmed the ALJ's determination that the Special Fund (and the government) had to pay the Section 10(f) annual COLAs, pursuant to Section 10(h)(3). Pet. App. B9. The Director did not dispute this determination. Pet. App. A8-A9, B9 n.2.

As the court explained, "[t]he death of a worker who died after 1972 did not *'occur'* before 1972. And we do not see how such a death can be said to have 'commenced' before 1972." Pet. App. A23. The court observed that this interpretation of the statute made "perfectly good sense" because the main purpose of Section 10(h)(1) was to increase benefits of claimants who had become entitled to benefits when the pre-1972 rates applied. Pet. App. A24. Since the survivors of a worker disabled before 1972 automatically receive the higher death benefit rates under Section 9 when the worker dies after 1972, the court concluded that no Section 10(h)(1) adjustment was necessary and that the provisions for payment of any such adjustment did not apply. Pet. App. A24-A25.

Rejecting petitioners' reliance on legislative history, the court concluded that the relevant materials "[a]ll * * * suggest that Congress intended [Section 10(h)(1)] only to adjust disability benefits for pre-1972 injuries, and to adjust death benefits for pre-1972 deaths." Pet. App. A28-A31. Moreover, the court stated, industry representatives had not complained about premium calculation problems for post-1972 deaths based on pre-1972 injuries. Pet. App. A32-A33. And the court observed that Congress's action was consistent with its practice of requiring insurers to pay increased or modified death benefits in pre-amendment injury, post-amendment death cases, when it amended the statute in 1948, 1956, 1961, and 1984. Pet. App. A33-A36.

The court also rejected petitioners' argument that Section 10(h)(1) should apply to this pre-1972 injury, post-1972 *death* case because the Section applies to pre-1972 injury, post-1972 *total permanent disability* cases. The court concluded that the Section

covered pre-1972 injuries that resulted in post-1972 total permanent disability for two reasons. First, while the amended Section 9 provides for increased death benefits in pre-1972 injury, post-1972 death cases, there is no such provision for giving increased disability benefits in pre-1972 injury, post-1972 permanent disability cases. Therefore, Section 10(h)(1) provides the only method for most of these workers to receive the more generous 1972 benefit rates. Pet. App. A39-A43. Second, the statutory language distinguishes between the two types of cases. The first sentence of Section 10(h)(1) covers "total permanent disability or death which commenced" prior to enactment of the 1972 amendments, and "[i]t is more natural to think of a post-1972 total disability arising out of a pre-1972 injury as having 'commenced' before 1972 than it is to think of a post-1972 death as having 'commenced' before 1972." Pet. A44. Moreover, as the court recognized, the second sentence in Section 10(h)(1), which describes how to calculate the adjustment, suggests an intent to include pre-1972 injuries that resulted in post-1972 disability because that sentence uses the phrase "disabling *injury* or death" (emphasis added) rather than "total permanent disability or death." Pet. App. A44. The court found no comparable evidence, or ambiguity, in the use of the word "death" in Section 10(h)(1).

Finally, the court acknowledged that in *Director, OWCP* v. *Detroit Harbor Terminals, Inc.*, 850 F.2d 283 (1988), the Sixth Circuit had adopted a contrary construction of Section 10(h)(1). Pet. App. A46. But the court agreed with the *Detroit Harbor* dissent that the language and purpose of the statute do not permit petitioners' construction. *Ibid.*

ARGUMENT

The court of appeals' decision is the correct reading of the statute. While the court's decision conflicts with that of the Sixth Circuit in *Detroit Harbor*, there are few if any remaining cases likely to be governed by the erroneous Sixth Circuit decision.[8] In addition, in any case subject to review in the Sixth Circuit, the Director will ask that court to reconsider its holding in light of the persuasive decision of the First Circuit.

1. The court below correctly recognized that the terms of Section 10(h)(1) and (2) do not authorize payment out of government appropriations and the Special Fund of any adjustment for post-1972 death claims, regardless of the date of injury or of permanent disability. The first sentence of Section 10(h)(1) limits adjustments to "total permanent disability or death which commenced or occurred prior to October 27, 1972." It is implausible at best that Congress would have used such language to apply to a death in 1983 on the ground that it "commenced or occurred" more than ten years earlier. See *Detroit Harbor*, 850 F.2d at 294 (Nelson, J., dissenting) ("I should be very surprised indeed if it ever crossed the draftman's mind that anyone might think the quoted words could cover a lingering death that 'commenced' prior to October 27, 1972, and finally came to a merciful end more than eight years later.").[9]

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[8] We are in fact aware of only one case in which the issue is pending before the Benefits Review Board; that case arises in the First Circuit and will be controlled by the court of appeals' decision here. See *Director, OWCP (Cain)* v. *Bath Iron Works Corp.*, 853 F.2d 11 (1st Cir. 1988) (dismissing petition for review for lack of a final order).

[9] Indeed, in those same 1972 amendments, and until 1984, Congress also made death benefits available to survivors of a

The second sentence of Section 10(h)(1) reinforces the Section's inapplicability to post-1972 death claims. That sentence defines the *amount* of the Section's adjustment in a manner that can apply only to pre-1972 deaths. Thus, the adjustment requires determining the compensation to which a survivor "would be entitled if the * * * death had occurred on the day following October 27, 1972" and subtracting "the compensation to which such employee or survivor was entitled on October 27, 1972." 33 U.S.C. 910(h)(1)(A)-(B). This computation makes sense for survivors of employees who died before October 27, 1972, because they would have been receiving the lower, pre-1972 benefit rates, and the computation would raise their rates under the 1972 amendments. The computation makes no sense in cases of employees who die after 1972 because their survivors, like Mrs. Lebel, are already entitled to the higher benefit rate under Section 9. Pet. App. C18-C19. It is irrelevant what rate would have applied if the death had occurred on "the day following" October 27, 1972, just as it is meaningless to inquire as to the compensation to which a survivor was entitled before that date; a "survivor" in every such case "was entitled" to *no* benefits at that time because no death had yet occurred.[10]

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totally disabled worker who died from causes unrelated to his disabling injury. See note 1, *supra*.

[10] Indeed, the Board recognizes the inapplicability of this adjustment formula to post-1972 death cases; the Board does not use the formula in computing the amount of the adjustment. In this case, the Board noted that petitioner Bath Iron Works had not challenged the entitlement of Mrs. Lebel and her son to $173.58 per week—the amount calculated by the ALJ according to the actual-date-of-death formula in Section

The court below also correctly read the legislative history of Section 10(h)(1). A provision like Section 10(h)(1) was first suggested during the hearings in order to increase benefits for permanently and totally disabled employees and widows "on the rolls as of [the] effective date [of the proposed amendments]". See *Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972: Hearings on S. 2318, S. 525, S. 1547 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 2d Sess. 172 (1972) (Ralph Hartman) (*Senate Hearings*). The House and Senate reported bills with language that became Section 10(h) (118 Cong. Rec. 30,672, 32,023, 36,376 (1972)), and the reports explained that the adjustment applied only to deaths occurring before 1972.[11] Sponsors or supporters of the bills similarly explained that Section 10(h) applied to "injured workers or the survivors

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9 of the Act. Pet. App. B7. The Board did not explain why it was appropriate under its theory to use this figure rather than the amount his survivors would have received if Mr. Lebel had died on the day after enactment of the 1972 amendments as indicated under Section 10(h). See also *Director, OWCP* v. *Detroit Harbor Terminals, Inc.*, 850 F.2d 283, 294 (6th Cir. 1988) (Nelson, J., dissenting) ("[N]one of these death benefits and funeral expenses can be attributed to an 'adjustment' required by § 10(h)(1) * * *. What [the survivor] actually received, of course, was a § 9 award, not an adjustment under § 10.").

[11] See H.R. Rep. No. 1441, 92d Cong., 2d Sess. 3 (1972) (Section 10 will increase benefits for "those people who have been receiving compensation"), *id.* at 18 (Fund pays adjustments for deaths "occurring prior to the date of enactment"); S. Rep. No. 1125, 92d Cong., 2d Sess. 6 (1972) (Section 10 increased benefits for "those people who have been receiving compensation"), *id.* at 22 (increase for "employees or survivors already receiving payments under the Act").

who have been receiving compensation" (118 Cong. Rec. 36,271 (1972) (Sen. Williams)), to "injured workers or survivors, presently receiving payments" (*id.* at 36,381 (Rep. Daniels)), and to persons "who have been declared permanently disabled, or are widows or survivors of such persons, prior to enactment of this bill" (*id.* at 36,386 (Rep. Steiger)). Nowhere is there any indication that Congress intended petitioners' counterintuitive result of giving an adjustment to survivors of employees who died after 1972, since benefits payable to those survivors under Section 9 already reflect the more generous rates.[12]

Finally, the interpretation adopted by the court of appeals "makes perfectly good sense" (Pet. App. A24) because the main purpose of Section 10(h)(1) was to increase benefits of those claimants who had become entitled to benefits before the post-1972 rates applied. Pet. App. A24. As Senator Williams, the cosponsor of the Senate bill, explained, Section 10(h) was "a very unique provision to assist those injured workers or the survivors who have been receiving compensation or benefits for total disability or death." 118 Cong. Rec. 36,271 (1972). And Congress obligated the Special Fund and federal appropriations to pay for the adjustments because "many of the workers or survivors receiving these benefits were in the employ of companies no longer in business" (*ibid.*), not because of any great concern about the premium calculation problem of insurers. Indeed,

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[12] Petitioners mistakenly rely on certain testimony by Edward D. Vickery. Pet. 22 (quoting *Senate Hearings* 343). As the court of appeals noted (Pet. App. A32-A33), Vickery's testimony, as well as references by Secretary of Labor Hodgson (*Senate Hearings* 32), addressed the *COLA provision* as applied to post-1972 injuries and not the *Section 10(h)(1) adjustment provision.*

Congress's consistent practice of requiring insurers to pay for increased or modified death benefits under the 1948, 1956, 1961, and 1984 Longshore amendments makes it most unlikely that Congress intended, without explanation, to relieve insurers of this burden in 1972. See Pet. App. A33-A36 and cases cited.[13]

2. Petitioners appear to recognize that their position cannot be squared with the text of Section 10 (h) (1) (Pet. 25-27), but argue that the statute cannot mean what it says because it must treat post-1972 death and post-1972 total permanent disability cases equally. But as the court of appeals explained, post-1972 total permanent disabilities differ in two respects from post-1972 deaths. First, the statutory language of Section 10(h)(1) is itself sufficiently flexible to encompass post-1972 disabilities caused by pre-1972 injuries: it is more natural to think of a disability as having "commenced" in a pre-amendment injury than to think of a death in those terms,[14] and Section 10(h)(1) also variously refers to the "disability or death" *or* "disabling injury or death" that occurred before 1972. Second, Section 10(h)(1) is the *only* section that can be read to grant post-1972 benefit amounts to those with pre-1972 injuries and post-1972 total permanent disabilities. Thus, failure to read Section 10(h)(1) in this way would appear

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[13] Petitioners' suggestion (Pet. 23-24) that Congress approved the Board's construction of Section 10(h)(1) when it amended the statute in 1984 is without merit because the Board did not decide the issue until 1986. See *Dennis* v. *Detroit Harbor Terminals*, 18 Ben. Rev. Bd. Serv. (MB) 250 (Ben. Rev. Bd. 1986), aff'd, 850 F.2d 283 (6th Cir. 1988). The Board decisions cited by petitioner (Pet. 23 n.17) concern not post-1972 deaths but post-1972 disabilities.

[14] See p. 9 and note 9, *supra*.

to leave a gap in adjustments that Congress did not contemplate. Post-1972 death benefits, by contrast, are available under Section 9 regardless of the date of injury. See *Travelers Ins. Co.* v. *Marshall*, 634 F.2d 843, 845-849 (5th Cir. 1981) (agreeing with five other courts of appeals that 1972 death benefit provisions of Section 9 apply to post-amendment deaths following pre-amendment injuries).

Petitioners contend in the alternative that Section 10(h)(1) *must* be ambiguous because the *Detroit Harbor* majority found it to be. Pet. 13-17. Even if this provision of the Longshore Act were ambiguous, the courts would be obligated to defer to the Director's reasonable interpretation. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).[15] And in any event, the majority in *Detroit Harbor*—which strained to assert that a death in 1980 had "commenced" in a 1969 injury (see 850 F.2d at 288)—offers no support for petitioners' position that is not fully refuted by the reasoning of the First Circuit in this case.

3. Although the First and Sixth Circuits have disagreed on the interpretation of Section 10(h)(1), review by this Court is unnecessary because the Sixth Circuit's erroneous decision will affect few, if any, cases. It was estimated in 1972 that only about 2000

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[15] Petitioners' suggestion that this Court should defer to the Benefits Review Board, and thus not to the Director (Pet. 23), is contrary to this Court's admonition that the Board "is not a policymaking agency; its interpretation of the LHWCA thus is not entitled to any special deference from the courts." *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980). The Director administers the statute for the Secretary of Labor. See 33 U.S.C. 939 (1982 & Supp. V 1987); 20 C.F.R. 701.202(a).

persons (employees and survivors) would be eligible for the Section's adjustment (118 Cong. Rec. 36,386 (1972) (Rep. Steiger)). And of these, only about 1400 were, like Mr. Lebel, employees receiving total permanent disability benefits. See Pet. 11. According to data the Department of Labor submitted to Congress during consideration of the 1972 amendments, less than 2% of covered injuries occurred at sites within the Sixth Circuit's jurisdiction. See *Senate Hearings* 762-763.[16] Applying this percentage in the present context, it appears that some 20 to 30 cases at most could ever have been subject to the Sixth Circuit's views on Section 10(h)(1). The benefits due in such cases are, similarly, a minute fraction of the $300 million estimated cost cited by petitioners. Pet. 12.

Moreover, many of the cases that may have been subject to Section 10(h)(1) in 1972 are unlikely to raise the issue presented here in the Sixth Circuit in the future. Out of these cases, some individuals may die or have died without survivors. Others may die or have died of causes unrelated to the total permanent disability; the Board has thus far denied Section 10(h)(1) "adjustments" of death benefits

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[16] The Department provided estimates of its workload for the 15 district offices that existed in FY 1971. In that year, the Cleveland district included all Sixth Circuit states (Ohio, Michigan, Tennessee, and Kentucky) as well as Indiana, West Virginia, and Erie, Pennsylvania. See *Senate Hearings* 763, 764. The Cleveland office, excluding the port of Erie, received 1204, or 1.76% of the 68,464 Longshore injury reports for that year. *Id.* at 763. See also *id.* at 772 (injury reports for FY 1963-1970 for Cleveland office, including Erie, were 1.5-2.1% of the yearly totals).

to employers and insurers in this situation.[17] See *Witthuhn* v. *Todd Shipyards Corp.*, 3 Ben. Rev. Bd. Serv. (MB) 146, 148-149 (1976), aff'd, 596 F.2d 899 (9th Cir. 1979); *Rouse* v. *Norfolk, Baltimore & Carolina Lines, Inc.*, 2 Ben. Rev. Bd. Serv. (MB) 11, 16 (1975), aff'd, 539 F.2d 378 (4th Cir. 1976), cert. denied, 429 U.S. 1078 (1977). Cf. *Travelers Ins. Co.* v. *Marshall*, 634 F.2d at 845-849 and cases cited.

Nor can the number of potentially affected cases be expanded, as petitioners suggest (Pet. 11), to include those involving occupational diseases with "typically * * * long latency periods." Congress provided in 1984 that the date of injury in such cases "shall be deemed to be the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability." Pub. L. No. 98-426, § 10(a)(2), 98 Stat. 1647-1648 (codified at 33 U.S.C. 910(i) (Supp. V 1987)). Thus, workers exposed to asbestos and other harmful agents before 1972 are not deemed to be injured before 1972 for purposes of Section 10(h)(1) if the disease does not manifest itself or if the worker (or survivor in death cases) does not realize the disease's relationship to work exposure until after 1972. See, *e.g.*, *Taddeo* v. *Bethlehem Steel Corp.*, 22 Ben. Rev. Bd. Serv. (MB) 52 (Ben. Rev. Bd. 1989); *Pitts* v. *Bethlehem Steel Corp.*, 17 Ben. Rev. Bd. Serv. (MB) 17 (Ben. Rev. Bd. 1985). Because claims must be filed within two years of awareness of the injury (33 U.S.C. 913(b)(2) (Supp. V 1987)), claimants can no longer

[17] No death benefits whatever are available for deaths due to unrelated causes in cases of death occuring before 1972 or after 1984. See note 1, *supra*.

successfully file occupational disease claims based on pre-1972 injuries.

In sum, since the Sixth Circuit's decision, standing alone, will have little or no practical effect on the Longshore benefits program, we do not believe that the differing views of the First and Sixth Circuits require this Court's intervention on this narrow question of interpretation of a complex statutory provision. There will be time enough for the Court to review any decision that has a more serious impact.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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